LIBRARY
SUPREME COURT, U. S.

MAY 13 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term 1974

No. 74-1425

WILLIAM STEINMAN,

Petitioner,

v.

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERVEY & LEGUM
Attorneys for Petitioner
AARON NUSSBAUM
Of Counsel
16 Court Street
Brooklyn, New York
Tel. (212) 237-1717

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

The Constitutional Provisions and State Statutes in Issue .. 3

New York State Constitution 4

Statutes of New York 5

New York Criminal Procedure Law 6

Statement of the Case 9

POINT I—The Extraordinary Prosecutorial Misconduct Conclusively Adduced At Bar Warranted Equitable Intervention For Federal Declaratory And Injunctive Relief, Under The Fifth And Fourteenth Amendments Of The Constitution. 20

POINT II — Petitioner has Been Irreparably Injured in that he has Been Utterly Deprived of an Adequate Remedy at Law and of all Meaningful Access to the State Courts ... 26

Conclusion 43

APPENDIX

Memorandum and Order Dated August 8, 1974 ..... A-1

Memorandum and Order Dated December 6, 1974 .... A-6

Amended Memorandum and Order A-12

Table of Authorities

	Page
United States Constitution, Fifth and Fourteenth Amendments	2
Title 18, U.S.C. 241	14
Title 18, U.S.C. 242	14
Title 28, U.S.C. 1254(1), 1343(3)	2
Title 28, U.S.C. 2281, 2284	15
New York State, Governor's Executive Order No. 58, Sec. 63	16,17,39
New York State Judiciary Law, Sec 149	5
New York Criminal Procedure Law, Secs. 140.20, 180.10, 180.60	6, 8
New York State Penal Law, Sec. 100.00	14
New York State Penal Law, Secs. 40.05, 190.25, 195.00, 210.10, 210.15, 250.05	5,14,16

Cases Cited

Allee v. Medrano, 416 US 802	41
Cameron v. Johnson, 390 US 611	40
Coe v. Armour, 237 US 413, 424-5	38
Coleman v. Alabama, 399 US 1	19
Coleman v. Burnett, 477 F2d 1187	28
Gerstein v. Pugh, ——US—— (1975)	28
In re Murchison, 349 US 133	35
Kugler v. Helfant, ——US——, Apr. 28, 1975	29
Mapp v. Ohio, 367 US 643, 660	20
Matter of Klein v. Murtagh, 44 App.Div.2d 465	17
Matter of Moritt v. Nadjari, 46 App.Div. 2d 784	33
Matter of Nigrone, 46 AD 2d 343	23,33
Matter of Reynolds v. Cropsey, 241 NY 389	29
Matter of Wendell v. Lavin, 246 NY 115, 123	30
O'Donohue v. U.S., 289 US 516	32
Olmstead v. United States, 277 U 438	42

Cases Cited (Continued)	Page
People v. Bell, 45 App.Div.2d 362	33
People ex rel Jackson v. Potter, 47 N.Y. 375	30
People ex rel S.L. & T. Co. v. Extraordinary Term of Supreme Court, 220 NY 487	19,29,32
People v. Harding, 44 App.Div.2d 800	33
People v. Klinch Packing Co., 214 NY 121	31
People v. Rao, 46 App.Div.2d 343	33
People v. Steinman, 44 App.Div.2d 839	33
People v. Levy, ——App.Div.2d—— (2d Dept., 1975)	33
Providence Bank v. Billings, 29 US 514	30
Rochin v. California, 342 US 165	18
Roller v. Holly, 176 US 398, 409	38
Rosalsky v. State, 254 NY 117	31
Russell v. United States, 41195/23	21
Samuel v. Mackell, 401 US 66, 67	21
Sherman v. United States, 356 U.S. 369	18
Springfield v. Philippine Islands, 177 U.S. 189, 201	32
Steffel v. Thompson, 415 US 452, 460	21
Stuart v. Palmer, 74 NY 183	31
Terry v. Ohio, 392 US 1	42
Tumey v. Ohio, 273 US 510, 532	36
United States v. Archer, 486 F.2d 670	12
United States v. King, 482 F.2d 768	28
United States v. McCord, 509 F.2d 334	24
United States v. Toscanino, 500 F.2d 267, 274	24
United States v. Walker, 473 F.2d 136	36
Younger v. Harris, 401 US 37, 45	20

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1974
No.

WILLIAM STEINMAN,

Petitioner,

v.

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner William Steinman prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated April 14, 1975, affirming a judgment of the United States District Court for the Eastern District of New York, rendered on December 13, 1974, dismissing an action for a Declaratory Judgment and for injunctive relief against a pending state criminal prosecution, under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States, and 28 USC 1343(3).

OPINIONS BELOW

No opinion was rendered by the Court of Appeals.

The unreported memorandum opinions of the District Court, dated August 8, 1974 and December 6, 1974 respectively, are set forth in Appendix A of this Petition (denying application for a three-judge court (A-1—A-5); dismissing complaint for declaratory and injunctive relief (A 6-12).

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), 28 U.S.C. 1343(3) and the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States.

QUESTIONS PRESENTED

1. In entrapping and arresting Petitioner without ever arraigning him in a criminal court, did Petitioner suffer great and immediate irreparable injury by depriving him of the right to counsel and to a preliminary examination, during a critical stage of the proceedings against him?

2. Did Respondent Nadjari engage in a pattern of bad-faith enforcement of the state's criminal laws, by unconstitutional means, (a) by entrapping and arresting defendants on a wholesale scale, with no intention to arraign or prosecute them in a court of law, but to coerce and intimidate them by gestapo tactics into entrapping innocent judges, secretaries and other public servants into

the commission of crime; (b) by systematic state-manufactured criminality in the illegal deployment of undercover agents posing as "convicted" defendants in courts of law, involving wilful perjury, subornation of perjury and fraud and deception of grand juries, district attorneys and the courts, although Respondent had been repeatedly forewarned to desist therefrom by the state and federal courts; and (c) by systematically engaging in other prosecutorial misconduct shocking to the conscience, offensive to the rule of law and to the fundamental tenets of decency?

3. Was Petitioner deprived of all meaningful access to the state courts, and of a fair and sufficient opportunity for vindication of federal constitutional rights, where the state statute under which the Extraordinary Term of the Supreme Court was organized and convened was *facially* unconstitutional and void (*a*) as inherently violative of the independence of the judiciary and the Separation of Powers; and (*b*) as inherently violative of Petitioner's procedural rights to due process of law, and to the equal protection of the laws?

THE CONSTITUTIONAL PROVISIONS AND STATE STATUTES IN ISSUE.

Constitution of the United States

Fifth Amendment

"No person *** shall be *** deprived of life, liberty, or property, without due process of law ***".

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the

right *** to be confronted with the witnesses against him *** and to have the Assistance of Counsel for his defense."

Fourteenth Amendment

" *** nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATUTES OF THE UNITED STATES

United States Code

28 U.S.C. 1343 (3) Civil rights and elective franchise.

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress for equal rights of citizens or of all persons within the jurisdiction of the United States;"

New York State Constitution

Article 6. Section 27 New York State Constitution.

> "Section 27 (*Extraordinary Term of the Supreme Court*):
>
> The Governor may, when in his opinion the public interest requires, appoint Extraordinary

Terms of the Supreme Court. He shall designate the time and place of holding the term and the Justice who shall hold the term. The Governor may terminate the assignment of the Justice and may name another Justice in his place to hold the term."

Statutes of New York

Section 149. Judiciary Law.

"Section 149. Governor may appoint extraordinary terms and name justices to hold them.

1. The governor may, when in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term.***"

2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division."

Section 63 of the Executive Law

"Section 63. General Duties. The Attorney General shall:

"1. ***"

"2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement ***."

New York Criminal Procedure Law

Section 140.20. Arrest without a warrant; procedure after arrest by police officer.

1. Upon arresting a person without a warrant, a police officer, after performing without unnecessary delay all recording, fingerprinting and other preliminary police duties required in the particular case, must except as otherwise provided in this section, without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question.***".

Section 180.10. Proceedings upon felony complaint; arraignment; defendant's rights, court's instructions and bail matters.

1. Upon the defendant's arraignment before a local criminal court upon a felony complaint, the

court must immediately inform him, or cause him to be informed in its presence, of the charge or charges against him and that the primary purpose of the proceedings upon such felony complaint is to determine whether the defendant is to be held for the action of a grand jury with respect to the charges contained therein. The court must furnish the defendant with a copy of the felony complaint.

2. The defendant has a right to a prompt hearing upon the issue of whether there is sufficient evidence to warrant the court in holding him for the action of a grand jury, but he may waive such right.

3. The defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the action, and, if he appears upon such arraignment without counsel, has the following rights:

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone, for the purpose of obtaining counsel and informing a relative or friend that he has been charged with an offense; and

(c) To have counsel assigned by the court in any case where he is financially unable to

4. The court must inform the defendant of all rights specified in subdivisions two and three. The court must accord the defendant opportunity to exercise such rights and must itself take such affirmative action as is necessary to effectuate them.

5. If the defendant desires to proceed without

the aid of counsel, the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until the defendant is provided with counsel, either of his own choosing or by assignment. A defendant who proceeds at the arraignment without counsel does not waive his right to counsel, and the court must inform him that he continues to have such right as well as all the rights specified in subdivision three which are necessary to effectuate it, and that he may exercise such rights at any stage of the action.

6. Upon the arraignment, the court, unless it intends immediately thereafter to dismiss the felony complaint and terminate the action, must issue a securing order which, as provided in subdivision two of section 530.20, either releases the defendant on his own recognizance or fixes bail or commits him to the custody of the sheriff for his future appearance in such action.

Section 180.60. Proceedings upon felony complaint; the hearing; conduct thereof.

A hearing upon a felony complaint must be conducted as follows:

1. The district attorney must conduct such hearing on behalf of the people.

2. The defendant may as a matter of right be present at such hearing.

3. The court must read to the defendant the felony complaint and any supporting depositions unless the defendant waives such reading.

4. Each witness, whether called by the people or

by the defendant, must, unless he would be authorized to give unsworn evidence at a trial, testify under oath. Each witness, including any defendant testifying in his own behalf, may be cross-examined.

5. The people must call and examine witnesses and offer evidence in support of the charge.

6. The defendant may, as a matter of right, testify in his own behalf.

7. Upon request of the defendant, the court may, as a matter of discretion, permit him to call and examine other witnesses or to produce other evidence in his behalf.

8. Upon such a hearing, only non-hearsay evidence is admissible to demonstrate reasonable cause to believe that the defendant committed a felony; except that reports of experts and technicians in professional and scientific fields of the kinds specified in subdivision two of section 190.30 are admissible to the same extent as in a grand jury proceeding.

9. The court may, upon application of the defendant, exclude the public from the hearing and direct that no disclosure be made of the proceedings.

10. Such hearing should be completed at one session. In the interest of justice, however, it may be adjourned by the court but, in the absence of a showing of good cause therefor, no such adjournment may be for more than one day.

STATEMENT OF THE CASE

Petitioner's action for a Declaratory Judgment, pursuant to 28 USC 2201, alleged substantially as follows:

(a) The Respondent Nadjari, acting in concert with the Federal Strike Force of the United States Attorney for the Southern District of New York, where this case has originated under a manufactured federal jurisdiction, unlawfully and wrongfully ensnared and entrapped the Petitioner into the commission of the crimes alleged against him, resulting in his arrest on September 25, 1973.

Petitioner was subsequently indicted by indictment filed in the Supreme Court of the State of New York, Extraordinary Special and Trial Term, County of Kings, on December 19, 1973, charging him with the crimes of Conspiracy in the Third Degree, Attempted Bribery in the Second Degree, and Grand Larceny in the Second Degree, in violation of the penal statutes of the State of New York.

(b) Thereafter, Respondent Nadjari did grossly abuse his oath and authority by wilfully and wrongfully depriving Petitioner of an arraignment in a criminal court following his arrest, as required by law, and did wilfully deprive Petitioner of the constitutional protections of a Court, the right to counsel, the right to a preliminary examination, and the right to confrontation of the witnesses against him, at a critical stage of the proceedings against him.

(c) Instead, Respondent Nadjari, his agents and deputies, acting in concert with various agents of the United States Attorney for the Southern District of New York, unlawfully held the Petitioner virtually incommunicado from the date of his arrest, September 25. 1973 as aforestated, until approximately three months afterwards, for the ulterior and unlawful purpose and design to attempt to coerce and intimidate the Petitioner to entrap and ensnare various public servants within the criminal justice system of Kings County, State of New York, particularly "any" Justice of the Supreme Court of the State of New York, County of Kings, "any" Secretary

to a Justice, members of the District Attorney's Office of Kings County, and the United States Attorney's Office for the Eastern District of New York, and various other public servants, into the commission of bribery, perjury and other related crimes.

(d) In the execution thereof, the said Nadjari, his agents and deputies, acting in concert with other law enforcement officers as aforestated, did continuously warn and threaten the Petitioner not to divulge or reveal to anyone that he had been arrested or taken into custody, as aforestated, and further, did warn and threaten him that if he did not "cooperate" as aforestated, he would be "immediately" fingerprinted, booked and arraigned in a criminal court in connection with his arrest as aforestated, and further would suffer the loss of his pension as Administrative Assistant of the Comptroller's Office of the State of New York.

(e) During the course of the extraordinary prosecutorial misfeasance aforesaid, the Respondent Nadjari, did attempt to coerce the Petitioner to plant an illegal electronic eavesdropping device or "bug" in the headquarters of the Democratic County Committee of Kings County; and did further attempt to coerce him through a notorious professional entrapper, one Nicholas DiStephano, to ensnare and entrap certain named members of the judiciary within the criminal justice system of Kings County, and a named Judge of the Surrogates Court, into the commission of criminal acts; to entrap and ensnare a named Congressman into the commission of an act of bribery by the introduction of an Alien Bill into Congress; to entrap a specifically designated Assistant District Attorney of Kings County to buy and pay for a Criminal Court Judgeship through a named political leader of Kings County.

In the presence and hearing of the Respondent's Police agents, the informant Nick DiStephano bluntly threatened Petitioner: *"They got me. I got you. Now you get them."*

(f) Further, in pursuance of the calculated plan and scheme to entrap innocent persons within the criminal justice system of Kings County into the commission of crimes as aforestated, the Respondent Nadjari, his agents, deputies and others acting in concert with him, without any sanction or authority in law whatsoever, contrived and systematically employed the device of a fictitious "arrest" and "conviction" of a Federal undercover agent to accomplish such purposes, and that in execution thereof, the Respondent did wilfully suborn perjury of various witnesses in testifying perjuriously in the criminal courts of the State of New York, and before the Grand Jury, and did further deceive Grand Juries, the District Attorney of Kings County, and the Supreme Court of the State of New York, County of Kings, with respect to the plea and sentencing proceedings in regard to the staged arrest and conviction of the Federal undercover "defendants" aforesaid.

(g) The Respondent Nadjari, his agents and deputies, in concert with other law enforcement agents aforestated, did falsely and fraudulently represent to the United States Court of Appeals in a criminal proceeding entitled *United States v. Archer*, 486 F.2d 670, decided July 12, 1973, rehearing denied September 26, 1973, and again to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, that the said manufactured device of a mock arrest and conviction of a Federal undercover "Defendant" had been expressly authorized, sanctioned and approved by Chief Judge Fuld of the Court of Appeals of the State of New York, whereas in truth and in fact, the said Chief Judge had never sanctioned or approved such practice, but rather, had in fact

explicitly declined to disapprove the same; and had in fact so specifically informed the Respondent, Nadjari, through his agents and deputies, long prior to the date of the entrapment and arrest of this Petitioner as aforestated.

(h) The Respondent Nadjari, his agents and deputies, acting in concert with law enforcement officers as aforestated, and in wilful defiance of the Court's plain admonition in *United States v. Archer*, supra, against the continued practice of "Government-induced criminality", did nevertheless, wilfully and wrongfully continue to employ such practices against, up to and including the date of the indictment, December 18, 1973.

(i) The Respondent Nadjari, did wrongfully and wilfully contrive to deprive Petitioner of his right to a fair and impartial trial, particularly as to his right to assert the affirmative defense of entrapment, by prejudicially asserting and disseminating in a widely-reported news conference pre-arranged by him together with the United States Attorney for the Southern District of New York, on December 19, 1973, publicly proclaiming that Petitioner had a criminal predisposition, whereas in truth and in fact, he had no criminal pre-disposition of any kind, and had never been involved in any act relating to bribery, larceny or any criminal act whatsoever.

(j) Again, the Respondent Nadjari, his agents and deputies, did, on successive dates thereafter, April 1st and April 2nd, 1974, seriously prejudice Petitioner's rights to a fair and impartial trial by further false and prejudicial publicity through the media regarding his alleged criminal pre-disposition, all directly violative of the Canons of Professional Responsibility promulgated by the American Bar Association in August 1969 dealing with "trial publicity", and in particular, directly violative of the order of the Appellate Division of the Second Judicial Depart-

ment dated January 25, 1974, specifically directing the sealing of all records pertaining to the criminal case pending against him; all grossly violative of the Petitioner's rights to due process of law under the Fifth and Fourteenth Amendments of the Constitution.

By reason of the facts aforestated, the Respondent Nadjari, individually and as Deputy Attorney General of the State of New York, has so grossly abused his authority and jurisdiction under the color of the Governor's Executive Order No. 58 aforestated, that he, his agents and deputies, and all others acting in concert with him, have thrust themselves into direct violation of the penal statutes, both state and federal, as follows: Criminal Solicitation (Penal Law, Section 100.00); Coercion in the First Degree (Penal Law, Section 135.60); Conspiracy to Commit Bribery in the Third Degree (Penal Law, Section 105.05); Attempted Eavesdropping, (Penal Law, Section 250.05); Official Misconduct (Penal Law, Section 195.00); Conspiracy to Commit Perjury in the First Degree (Penal Law, Section 210.15); Conspiracy to Commit Perjury in the Second Degree (Penal Law, Section 210.10); Criminal Impersonation (Penal Law, Section 190.25); Deprivation of rights under color of law (Title 18 United States Code Section 242); Conspiracy against rights of citizens (Title 18 United States Code Section 241); among others.

The prosecutorial misconduct of the Respondent Nadjari, his agents and deputies and the law enforcement agents acting in concert with him, as aforestated, under color of the penal statutes of the State of New York and Executive Order No. 58, is so shocking to the conscience, and offensive to the canons of decency, and so violative of principles of fundamental fairness and a universal sense of justice, that the Court should bar the Respondent Nadjari from invoking judicial processes to

prosecute the indictment obtained against this Petitioner, and to dismiss the indictment in the interests of justice, in order to protect the integrity of the administration of criminal justice, to preserve the purity of the Courts, and to protect the citizen, and particularly this Petitioner, from the lawless and unconscionable conduct of law enforcement officers.

The Petitioner has no adequate remedy at law in the state courts to redress the deprivation of his constitutional rights, or to prevent the irreparable injury to him, except by way of an injunction, pursuant to Title 28 United States Code, Sections 2281 and 2284, to stay the prosecution, and for a declaratory judgment to declare the indictment against him null and void under the Fifth and Fourteenth Amendments of the Constitution.

In a supporting affidavit for a three-judge Court, Petitioner further alleged substantially as follows:

The trial of the indictment and all pre-trial proceedings relating thereto are now pending before the Hon. John M. Murtagh, Justice of the Supreme Court, appointed by the Governor of the State of New York, under color of Section 149, of the Judiciary Law, and of Article 6, Section 27 of the New York State Constitution, which provided as follows:

> "Sec. 27. Extraordinary terms of the Supreme Court.
>
> The Governor may, when in his opinion the public interest requires, appoint extraordinary terms of the Supreme Court. He shall designate the time and place of holding the term and the justice who shall hold the term. The Governor may terminate the assignment of the justice and may name another justice in his place to hold the term."

"Section 149. Governor may appoint extraordinary terms and name justices to hold them.

1. ***

2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division."

In pursuance therewith, the Honorable J. Irwin Shapiro, Associate Justice of the Appellate Division of the Supreme Court, Second Judicial Department, granted an order on January 25, 1974, authorizing Petitioner to bring the following preliminary motions, among others, directly before a term of the Appellate Division.

1) For an order dismissing the indictment in the furtherance of and in the interest of justice, under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States and Art. 1, Sec. 6 of the New York State Constitution.

2) For an order pursuant to Section 210.20 subdivision 1(h) of the Criminal Procedure Law dismissing the indictment on the specific ground that Nadjari had grossly abused and violated the jurisdictional scope of his statutory power and authority vested in him through *Article VI, Section 27 of the Constitution of the State of New York, Section 63 of the Executive Law* and *Governor's Executive Order no. 58* dated September 19, 1972, and the due process clause of the Constitution.

3) For an order superseding and disqualifying Nadjari and any member of his staff, from managing and con-

ducting the further prosecution of Petitioner, and for an order requesting the Governor and/or the Attorney General of the State of New York to supersede the said NADJARI as Special Prosecutor therein.

4) For an order disqualifying Hon. John M. Murtagh, presiding justice of the Extraordinary Special and Trial Term from presiding at the trial of the action herein, if any, and staying the trial of this action until the appointment of another Justice in his place, or the designation of an additional Extraordinary and Special Trial Term by the Governor pursuant to specific authorization contained in *Article VI. Section 27 of the New York State Constitution* and *Section 149 of the Judiciary Law* and the due process clause of the Constitution.

On May 20, 1974, the Appellate Division rendered its decision, denying Petitioner's various motions to dismiss the indictment on due process grounds for prosecutorial misconduct, to supersede and disqualify the Respondent Nadjari, and to disqualify Judge Murtagh from presiding at the trial of the Petitioner.

In adopting the concurring opinion of Mr. Justice Shapiro in a companion case, *Matter of Klein v. Murtagh*, 44 App. Div. 2d 465, decided therewith, the Appellate Division stated:

> "*** in dismissing the petitions we have not reached or passed upon the petitioners' contention that the lawless conduct of the investigators in this case is so offensive to the administration of justice and to prevailing standards of decent behavior that this prosecution should be barred.
>
> While I am in general agreement with the disapproval voiced by Judge Friendly in *United States v. Archer* (486 F 2d 670) of the prosecutorial

conduct of the Government (both State and Federal), the question of whether such conduct constituted government induced criminality (*Sherman v. United States*, 356 U.S. 369), or was otherwise of such a nature as to violate principles of fundamental fairness sufficient to preclude the prosecution of the petitioners (*Rochin v. California*, 342 U.S. 165), or whether the indictment should be dismissed in the interest of justice (CPL 210.40), should be decided at the trial level on a full record containing all the essential facts showing the manner in which the events leading to the prosecution of the petitioners were planned and carried out. The determination of these questions cannot properly be made on an application for an order in the nature of prohibition."

Petitioner contended in the District Court below that he had suffered great and immediate irreparable injury by reason of the shocking prosecutorial misconduct aforesaid, and that he had no meaningful access to the state courts, for the following reasons:

- *Section 149, subd. 1 Judiciary Law*, under and by which the Extraordinary Term of the Supreme Court was organized and convened, was *facially* unconstitutional in that it was inherently violative of the independence of the judiciary, and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution.

- It was inherently violative of Petitioner's fundamental right to due process and the equal protection of the laws, (*Judiciary Law, Sec. 149, subd. 2*), in that it substantially diminished the procedural due process rights

of all criminal defendants before the Extraordinary Term of the Supreme Court, as compared to all other defendants before the regularly constituted criminal terms of the Supreme Court. (cf. *People ex rel. S.L. & T. Co. v. Extraordinary Term of Supreme Court*, 220 NY 487 (1917), opinion Cardozo, J.; *Matter of Reynolds v. Cropsey*, 241 NY 389.

• By hand-picking his own Special Prosecutor to manage and conduct all proceedings in the court so controlled by the Executive as aforesaid, the Governor has not only magnified manifold the potential dangers of *Section 149 Judiciary Law* to the independence of the judiciary and to the due process rights of an accused, but has likewise rendered *Section 63 Executive Law* and *Executive Order No. 58* issued thereunder, unconstitutional and void, as applied, under the Due Process Clause of the Constitution.

In this connection, Petitioner formally notified the District Court that there was now pending in the State courts an independent action instituted by Petitioner for a Declaratory Judgment to declare the said statute and constitutional provision unconstitutional and void, upon their face, and as applied, under the Due Process Clause of both the federal constitution, and the Constitution of the State of New York, Act 1, Sec. 6. That action is now pending in the Appellate Division of the Supreme Court, Second Judicial Dept., State of New York (*Steinman v. Nadjari*).

• The Respondent's wilful deprivation of Petitioner's right to counsel and to a preliminary examination, during a critical stage of the criminal proceedings against him, caused him great and immediate irreparable injury in his fundamental rights to a fair trial. (*Coleman v. Alabama*, 399 U.S. 1).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

POINT I

THE EXTRAORDINARY PROSECUTORIAL MISCONDUCT CONCLUSIVELY ADDUCED AT BAR WARRANTED EQUITABLE INTERVENTION FOR FEDERAL DECLARATORY AND INJUNCTIVE RELIEF, UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

The tests of "special circumstances" and "irreparable injury" laid down in the guiding precedent of *Younger v. Harris*, 401 US 37, 45, have been amply met in the conclusively documented allegations of extremely shocking prosecutorial misconduct set forth in Petitioner's action for a Declaratory Judgment in the District Court below.

Rarely in all prosecutorial experience in this country has "the ignoble shortcut to conviction" (*Mapp v. Ohio*, 367 US 643, 660) descended to the levels enumerated here, enveloping the very integrity of the judicial process and the administration of criminal justice.

Seldom in all the annals of criminal jurisprudence has a prosecutor so flagrantly abused the lawful limits of power and authority as in the case at bar.

In a multiple layer of entrapment and state manufactured criminality systematically practiced by the respondent Nadjari, (a) he entrapped the petitioner, with no intention to prosecute him, provided he would "co-operate"; (b) he attempted to coerce and terrorize the entrapped Petitioner by threat and terror, to entrap others; (c) he wilfully

deprived Petitioner of his constitutional right to any arraignment whatsoever, during a critical stage of the criminal proceedings against him (*Coleman v. Alabama*, 399 U.S. 1);; (d) he deliberately committed wholesale perjury and did suborn perjury in the criminal courts and grand juries through the manufactured device of pseudo-arrests and pseudo-convictions of undercover "defendants" for the purpose of entrapping others, without any authority or sanction of law whatever; (e) he falsely represented to the courts that he had received the express authorization, sanction and approval of the Chief Judge Stanley H. Fuld for the deployment of staged arrests and fake convictions, when in truth and in fact, he had no such permission, and indeed, Judge Fuld had explicitly rejected Nadjari's specific request for approval or sanction of such tactics in April, 1973; and (f) he systematically disseminated grossly false and seriously prejudicial publicity against the Petitioner regarding his alleged, but non-existent predisposition to crime, in flagrant violation of the Code of Professional Responsibility promulgated by the American Bar Association.

The totality of these conclusively documented practices, amply meets the test of "extraordinary circumstances" (*Younger v. Harris, supra*); "unusual situations", (*Samuel v. Mackell*, 401 U.S. 66, 67); and "bad faith enforcement or other special circumstances" (*Steffel v. Thompson*, 415 U.S. 452, 460), causing irreparable injury both great and immediate, and warranting federal intervention by declaratory and injunctive relief.

In *Russell v. United States*, 41195/23, Mr. Justice Rehnquist expressed the following caveat, 411 U.S. at p. 431, namely, that the Court might:

"some day be presented with a situation in which

> the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 US 165, 72 S. Ct. 205, 96 L. ed. 183 (1952) . . . "

We earnestly submit to the Court that the case at bar presents precisely such a situation.

It is significant that the Respondent's actions in the name of the law have already begun to merit the sharp rebuke of the federal and state courts.

In *United States v. Archer*, 486 F. 2d 670 (CA 2), in a setting of manufactured criminality identical as at bar — indeed, involving the very same prosecutor, the same police agents, and the same informant — the Court stated:

> "We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants stand convicted went beyond any prosecutorial role and needlessly injected the Federal government into a matter of state concern."

As to the entrapment issue, the Court pointedly added:

> " . . . Our intuition inclines us to the belief that this case would call for application to Mr. Justice Brandeis' observation in *Olmstead*, even though that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime.***
>
> Since we conclude reversal to be required on

another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part."

In *the Matter of Salvatore Nigrone*, the Appellate Division of the Second Department, 46 AD 2d 343 (1974), once again condemned this practice, as did the Archer Court, and declared as follows:

> "The deception of grand jurors, Judges and Assistant District Attorneys and the filing of false official documents are absolutely intolerable. *** When, as here, the criminal justice system is made an unwitting accomplice of an overzealous prosecutor, before the fact, its impartiality is destroyed and contempt for the law encouraged. ****
>
> Though the purpose of the Special Prosecutor may be laudatory, he is not above the law and may no more resort to corruption and manipulation of the criminal justice system than the individual he seeks to prosecute."

Mr. Justice J. Irwin Shapiro, in an opinion holding that the indictment should be dismissed under the Due Process Clause, further held:

> "The myopic view of the Special Prosecutor with regard to his conduct destroys the contention of the majority that we have here a *sui generis* case and that its condemnation 'will suffice to prevent its repetition'. In this connection it should be remembered that almost exactly the same kind of conduct was severely condemned in *United States v. Archer* (486 F.2d 670), a case in which the

Special Prosecutor here participated as amicus curiae.*****

A dismissal of the indictments here would not hamper proper investigative procedures, but would serve notice that *Javert* type techniques which utterly disregard basic constitutional rights, violate statutory law and constitute an intrusion on those rights which we as a free people hold most dear may not be perpetrated with impunity. We must set our face unalterably against lawless law enforcement as a proper device to be used by prosecutors even if their motives be of the best—for sanctioning them can only have a chilling effect on proper law enforcement and result in the eventual erosion of many of our basic constitutional rights."

"The requirement of due process *** extends to the pretrial conduct of law enforcement authorities." (*United States v. Toscanino*, 500 F 2d 267, 274 (CA 2, 1974).

The U.S. Court of Appeals for the D.C. Circuit, *en banc*, on Dec. 12, 1974, in *United States v. McCord*, 509 F2d 334 said:

"*** we have no doubt that McCord's most general assertion of principle is grounded in respectably authority: i.e. serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial without regard to prejudice to the accused."

In dismissing Petitioner's action for a Declaratory Judgment and for a 3-Judge Court, the District Court erroneously held that:

"When what in substance being challenged is neither a statute, nor the policy underlying the statute, rather the activities of a state officer

appointed under the authority of the statute, resort to a three-judge court is inappropriate (cases cited)." (A-4).

The indisputable fact is, however, that the prosecutorial misconduct of the Respondent Nadjari depicted at bar reflected a systematic policy affecting not only this Petitioner, but a host of others similarly situated.

The sinister tactic of incommunicado arrest for the purpose of ensnaring and entrapping others has been a standard policy of Respondent Nadjari in several reported cases, several of which have already surfaced in the public notoriety. Among those involved at least one member of the Bar of Kings County, a former Law Secretary to a Justice of the Supreme Court in the County of Kings, who were likewise arrested without ever having been arraigned in a court of law, and surreptitiously "wired" to entrap judges and others within the criminal justice system, and, among others, an elected judge of the Civil Court, New York County, who though actually arrested, was likewise never formally arraigned in a court of law, but immediately pressed into service as a wired informant for the Respondent.

POINT II

PETITIONER HAS BEEN IRREPARABLY INJURED IN THAT HE HAS BEEN UTTERLY DEPRIVED OF AN ADEQUATE REMEDY AT LAW AND OF ALL MEANINGFUL ACCESS TO THE STATE COURTS.

The prerequisite showing of great and immediate irreparable injury to Petitioner, "resulting in a deprivation of meaningful access to the state courts" (*Allee v. Medrano*, 416 US 802, 94 S.Ct. 2191, 2210 (1974), was here conclusively established, in four-fold respect as follows:

A.

The Total Denial of Counsel, Arraignment or Right to Preliminary Examination

Petitioner was intentionally deprived of the right to counsel during a critical stage of the proceedings against him, and the right to a preliminary hearing. In utterly depriving him of these elementary rudiments of due process, petitioner's indispensable fundamental rights to a fair trial have been irretrievably lost. The full measure of that loss is delineated in *Coleman v. Alabama*, 399 US 1, wherein the Court stated:

> "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case, that may lead

the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial.

Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail. The ability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid (of counsel as at the trial itself. Powell v. Alabama, supra, at 57, 53 S Ct at 60."

New York Criminal Procedure Law Sec. 140.20 requires that a police officer

> "upon arresting a person without a warrant must *** without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question."

New York Criminal Procedure Law, Sec. 180.70 subd. 4, provides:

> "If there is not reasonable cause to believe that the defendant committed any offense, the court

must dismiss the felony complaint and discharge the defendant from custody if he is in custody, or, if he is at liberty on bail, it must exonerate the bail."

Under *Section 180.60 of the New York Criminal Procedure Law*, each witness at the preliminary hearing, whether called by the people or by the defendant, may be cross-examined; a defendant may, as a matter of right, testify in his own behalf; and, upon his request, the court may permit him to call and examine other witnesses or to produce other evidence in his behalf.

By wilfully depriving Petitioner of a preliminary hearing altogether, the Respondent foreclosed him from establishing that there was no "reasonable cause to believe that he committed a felony". Manifestly, had such hearing been had, Petitioner would have had the opportunity to prove, and would have proved, through electronic tapes in Respondent's possession or control, of all conversations with the informant, that Petitioner had been indeed entrapped, as a matter of law, and that probable cause for his arrest was lacking. (*Gerstein v. Pugh*, ———US——— (1975); *New York Penal Law* Sec. 40.05; *Pitler, New York Criminal Procedure Law*, pp. 204-209; *Coleman v. Burnett*, 477 F 2d 1187 (CA5, 1973); *United States v. King*, 482 F 2d 768 (CA, DC, 1973).

It will be noted that nowhere in the opinion of the District Court below did it even consider or evaluate the great or immediate irreparable injury to Petitioner posed by the failure to accord him the right of counsel, or of a due arraignment in a court of law, during a critical stage of the proceedings against him under the *Coleman* standard of due process.

Indeed, flatly contrary to the teachings of *Coleman*, the

Respondent misleadingly contended in the Court below, as follows:

> "The right to a prompt preliminary hearing or arraignment is a state, not a federal, right. (*Resp. Brief in Support of Motion to Dismiss*).

Nor did the District Court even consider the facial unconstitutionality of the statutes bearing directly on the crucial issue whether Petitioner had meaningful access to the State Courts, or a fair opportunity to vindicate his federal constitutional rights (*Younger v. Harris*, 401 US 37; *Kugler v. Helfant*,—US—, April 28, 1975, 17 Cr L 30007).

B

The Facial Unconstitutionality of the Statute Directly Affecting the Independence of the Judiciary.

Above all, the state prosecution at bar is fatally infected with a statute unconstitutional *on its face*, going to the very jurisdiction and competence of the Court, in two-fold respects, as follows:

(A). It is inherently violative of the independence of the judiciary; (*Judiciary Law, Sec. 149, subd. 1*)

(B). It is inherently violative of an accused's right to due process and the equal protection of the laws (*Judiciary Law, Sec. 149, subd. 2*] in that it substantially diminishes the rights of all litigants before the Extraordinary Term of the Supreme Court, as compared to all other defendants in the regular Criminal Terms of the Supreme Court. (cf. *People ex rel. S.L. & T. Co. v. Extraordinary Term of Supreme Court*, 220 NY 487 (1917), opinion Cardozo, J.; *Matter of Reynolds v. Cropsey*, 241 NY 389 (Appendix, pp. 94-96)

In the absolute power vested in the Governor to appoint *and to remove at will*, any judge designated by him to hold the extraordinary special and trial term of the supreme court, both *Article 6, Section 27 of the New York State Constitution* and *Section 149 of the Judiciary Law* are unconstitutional and void, on their very face, as inherently violative of the independence of the judiciary, and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article 1, Section 6 of the New York State Constitution.

The settled law is that a provision in a state constitution is subject to the same statutory rules of construction, consistent with the due process clause of the federal constitution, as any state statute.

In *Matter of Wendell v. Lavin*, 246 NY 115, 123, the Court of Appeals declared:

> "The same rules apply to the construction of a Constitution as to that of statute law. (*People ex rel Jackson v. Potter*, 47 N.Y. 375, pp. 379-380".
>
> Accord: *Newell v. People*, 7 NY 9.

The fatal flaw of the statute and constitutional provision in issue is *that in its in-built potential of control by the Governor over any judge appointed by him it is inherently violative of the independence of the Judiciary.*

The cardinal principle laid down by this Court, of long vintage, is that the constitutionality of a measure depends not on the degree of its exercise but on its principle. (*Providence Bank v. Billings*, 29 U.S. 514, 7 L Ed. 939).

In *Stuart v. Palmer*, 74 N.Y. 183, 189, the New York Court of Appeals long ago followed the same seminal test of constitutionality:

> "The constitutional validity of law is to be tested, not by what has been done under it, but by what

may, by its authority, be done."

Again, in *Rosalsky v. State*, 254 NY 117 (1930), the Court stated:

> "We measure the validity of statutes, not by what has actually been done under cover of their provisions, but by what with reason may be done. Stuart v. Palmer, 74 N.Y. 183, 30 Am. Rep. 289; Matter of Richardson, 247 NY 401, 421, 160 NE 655."

In *People v. Klinch Packing Co.* 214 N.Y. 121, 138-139 (1915), the Court reiterated the applicable rule:

> " . . .we are to judge of a statute by what is possible under it, in the absence of any guide it might very well happen that an administrative officer with the best of purposes would nevertheless be very falliable in the execution of them."

Directly pertinent is this Court's decision in *Dreyer v. Illinois*, 187 U.S. 71, where Mr. Justice Harlan stated at page 84:

> "'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensible to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distince, and have no common link of connection or dependence, the one upon the other, in the slightest degree. *The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.* Story's Const. (5th ed.) 393 ..." (Emphasis supplied.)

The doctrine of Separation of Powers in our constitutional system of government by checks and balances is a "bulwark against tyranny" (*United States v. Brown*, 381 US. 437 (1965).

Accord: (*O'Donohue v. U.S.* 289 US 516; *Kilborne v. Thompson*, 103 U.S. 168, 190; *Springfield v. Philippine Islands*, 177 U.S. 189, 201; *Federalist Papers* No. 47, 48, 51.)

The gravely pernicious potentials of the statute in issue are readily apparent.

The independence of the judiciary is automatically subjugated to the control, whim and caprice of the Executive. The power to hire and fire a judge puts the Executive implacably "in control of judicial action" (*People ex rel S.L. & T. Co. v Extraordinary Term* 220 NY 487.)

A judge so compromised would be inevitably impelled to tilt the balanced scales of justice against any accused—if only to curry the favor on the one hand, or avert the retribution of the Governor, on the other. In a court of justice so heavily stacked against the accused, with the Governor holding the strings of both the judge and prosecutor, the elemental rights to a fair trial are hopelessly compromised. No judge so situated could reasonably maintain the balance true, despite the best of intentions and the highest nobility of motive.

To expect any judge or Court, so situated, to maintain an even balance of judicial objectivity under these unique and extraordinary circumstances, would be to strain for the fulfillment of the impossible from any human being.

Even far beyond its mere potential, the unprecedented imperial power vested in the Governor by *Section 149 of the Judiciary Law* has inevitably tended to invite, encourage and generate the very tyrannical abuses practiced by the

respondent at bar, not only against this Petitioner, but against all others similarly situated, as reflected in a proliferating number of reported cases.

It is no mere coincidence that of all those indicted by the Respondent Nadjari under color of these statutes and the Governnor's Executive Order issued thereunder, an abnormal number of those charged have interposed defenses charging wilful entrapment, failure to arraign defendants in a criminal court, gross prosecutorial misconduct violative of due process, gross abuse of jurisdication, outrageous and unfair trial tactics, and "perversion of the criminal justice system of an overzealous prosecutor" (*See Matter of Nigrone*, 46 AD 2d 343) (2d Dept., 1975); *People v Bell*, 45 App. Div. 2d 362 (1st Dept. 1974); *People v. Harding*, 44 App. Div. 2d 800 (1st Dept. 1974); *People v. Rao*, 46 App.Div.2d 343 (2d Dept. 1975); *United States v. Archer*, 486 F.2d 670 (CA 2); *Matter of Klein v. Murtagh*, 44 App.Div.2d 465 (2d Dept., aff. 34 NY 2d 988); *People v. Steinman*, 44 App.Div.2d 839 (2d Dept., 1974); *People v. Levy*,—App Div. 2d—(2d Dept., 1975); *Matter of Moritt v. Nadjari*, 46 App.Div. 2d 784 (2d Dept.).

With the utmost deference and respect for the Judge presiding over the Extraordinary Term, the recent decision by the Appellate Division of The Supreme Court, First Department, in *People v. Bell*, supra (July 9, 1974), unanimously reversing a judgment of conviction obtained by the respondent Nadjari in the Extraordinary Term of the Supreme Court, is highly illustrative of the inadvertent psychological pressures operative against a fair trial for any accused in the Court constituted under the unconstitutional statutes here in issue.

There, reversing a conviction of a police officer for Attempted Possession of a Dangerous Drug in the First Degree, Burglary in the First Degree and Attempted Grand

Larceny in the Second Degree, with concomitant sentence of six to eighteen years in prison, the Appellate Division held:

> "On this record, it is clear that the totality of the trial court's errors was prejudicial and, in effect, denied defendant-appellant Richard Bell a fair trial. . . .
>
> 'Read as a whole, the charge was prejudicial in that it appeared to emphasize the strength of the prosecution's case, in derogation of the requirement to give balanced instructions to the jury in a criminal trial. . . ."

Of the same tenor, see *People v. Levy,* ———*AD2d*——[*2d Dept. Feb. 24, 1975*] *People v. Johnson,* ———AD 2d———(1st Dept. 1974), 361 NYS 2d 921, 926; *People v. Harding,* 44Ad 2d 800 (1st Dept.); *People v. Mackell*——Ad 2d———(2nd Dept. 1975); *Matter of Nigrone* 46 AD 2d 343 (2d Dept. 1974).

In the light of the unconstitutional statutes aforesaid, the District Court plainly erred in holding that "Plaintiff has a forum where he can assert these due process violations."

To relegate Petitioner to a trial before the Judge presiding in the Extraordinary Term, be it Judge Murtagh or any other designee of the Governor, would be patently prejudicial to his procedural rights of due process, and to his constitutional right to a fair and impartial trial.

Indeed, a resolution of the critical issues propounded by the Petitioner, engendered by the extraordinary prosecutorial misconduct shown at bar, would necessarily require the Court to pass value judgments upon such subjective pre-trial issues as the pending motions therein (A) to disqualify the Respondent as the prosecutor in this case, upon the ground that neither this Petitioner nor any other defendant could get a fair trial at his hands under the

shocking misconduct already evidenced at bar; (B) to dismiss the indictment under the Due Process Clause of the Constitution as a judicial sanction to protect the integrity of the judicial process and the rule of law; (C) to dismiss the indictment for Respondent's gross abuse of jurisdiction in the systematic manufacturing of crime in order to prosecute it; (D) to disqualify Judge Murtagh; and (E) to rule on the very constitutionality of the statutes upon which the court itself is legally structured.

In net effect, by relegating Petitioner to seek redress of his federal constitutional rights before the Judge presiding over the facially unconstitutional Extraordinary Term, and more particularly, for a special ruling on the constitutionality of the statutes under the Separation of Powers doctrine, would implicate the presiding Judge in an untenable situation in which he, in effect, would be called upon to invalidate the very Court over which he presided.

Indeed, if Petitioner's contention as to the facial unconstitutionality of the statute is valid, then the Extraordinary Term of the Supreme Court is utterly without power or competence even to resolve that issue, or any other, as an illegally constituted court.

In re Murchison, 349 U.S. 133 (1965), the Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. ***But our system of law has always endeavored to prevent even the probability of unfairness.*** To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. ***Circumstances and relationships must be considered. This Court has said, however, that every procedure which would***

offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 71 L. ed. 749, 758, 47 S. Ct. 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L. ed. 11, 75 S. Ct. 11." (emphasis ours.)

In *United States v. Walker,* 473 F 2d 136 (CA, DC. 1972), the Court noted:

"The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious."

C

The State Statute Seriously Diminished the Rights Of All Litigants, And Is Facially Violative of the Equal Protection Clause of the Fourteenth Amendment.

Gravely compounding the dangerous potentials of this King George-III type statute wholly destructive of the independence of the judiciary, the legislature concomitantly whittled away the fundamental rights of an accused to procedural due process of law.

Every litigant before the Extraordinary Term, is automatically forfeit to severely diminished rights in the determination of critical pre-trial motions and proceedings, in utter denial of their due process rights to the equal protection of the laws. (See *People ex rel. S.L. &*

T. Co., v. Extraordinary Term. 220 N.Y. 437, opinion by Judge Cardozo; *Dreyer v. Illinois.* 187 U.S. 71, 84.). Thus:

Originally, a defendant had the absolute right to present any pre-trial motion to the Special Term of the Supreme Court, rather than to the Extraordinary Term, as all other defendants in the regularly constituted criminal terms.

As originally construed by New York's highest court, the Extraordinary Term when created "became a term of the Supreme Court with the same jurisdiction that belongs to any other term." (*Matter of Reynolds v. Cropsey, supra*). "It does not enlarge or diminish the rights of litigants,,,,No such interpretation is thinkable." (*People ex rel. SL & T Co.*. 220 NY 487 (1917), per Judge Cardozo.

However, subsequent thereto, the legislature added a new subdivision (L. 1960, ch. 164) massively diminishing the rights of litigants, reading as follows:

> "2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division."

Thus, under the facially unconstitutional statute aforesaid, petitioner and all others similarly situated are rigidly restricted to the Extraordinary Term alone for vindication of their rights of due process to a fair and impartial trial, save only for the limited right to apply to the Appellate Division with respect to preliminary matters, subject however, to the over-all discretionary right of a justice of the Appellate Division to grant or withhold such

permission (*Section 149, subd. 2, Judiciary Law*).*

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." (*Roller v. Holly*, 176 U.S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410) Accord: *Coe v. Armour*, 237 U.S. 413, 424-5; *Wuchter*, 276 U.S. 13, 24.

A defendant before any regular term of the Supreme Court, however, would have the absolute right to move at general Criminal Term for disqualification of a judge, for a change of venue, or for dismissal of the indictment on due process grounds where, such as here, it is "required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or court would constitute or result in injustice." (*New York Criminal Procedure Law, Sec. 210.40*). Here, Petitioner had no such rights.

Again, in stark contrast to the severe limitations and restrictions imposed on all litigants with respect to pre-trial proceedings in the unconstitutional Extraordinary Term, the recently amended CPL 255.20 (L. 1974, Ch. 763, eff. Sept. 1, 1974), dealing with pre-trial omnibus motions generally, provides as follows:

> "All pre-trial motions, with supporting affidavits affirmations, exhibits and memoranda of law, whenever practicable, shall be included within the same set of motion papers, and shall be made returnable on the same date, *unless the defendant shows that it would be prejudicial to the defense were a single judge to consider all the pre-trial motions.....*" (Empahasis ours)

* Indeed, as aforementioned, petitioner's motions for pre-trial relief had been duly addressed to the Appellate Division, but were relegated back to the Extraordinary Term of the Supreme Court for disposition.

Here, however, there is but a single solitary judge alone to whom petitioner may repair for redress of his constitutional rights, thus effectively depriving him of the equal protection of the laws.

D.

Section 63 of the Executive Law, and the Governor's Executive Order No. 58, As Applied, Is Violative of the Due Process Clause.

Section 63 of the Executive Law, implementive of and complementary to *Section 149 of the Judiciary Law* aforestated, provides in pertinent part as follows:

> "Section 63. *General Duties.* The Attorney General shall:
> "1. ...
> "2. Whenever required by the governor, *attend in person, or by one of his deputies,* any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement . . .." (Emphasis ours.)

By designating his own Special Prosecutor to manage and conduct all proceedings in the court so controlled by the Executive as aforesaid, the Governor has not only magnified manifold the potential dangers of *Section 149 of the Judiciary Law* to the independence of the judiciary and to the due process rights of an accused, but has likewise rendered *Section 63 of the Executive Law* and *Executive Order No. 58* issued thereunder, unconstitutional and void, *as applied*, under the Due Process Clause of the Constitution.

This court has held that "(w)e have not hesitated on direct review to strike down applications of constitutional

statutes which we have found to be unconstitutionally applied." (*Cameron v. Johnson*, 390 US 611; *Cox v. Louisiana*, 379 US 559; *Steffel v. Thompson*, 415 U.S. 452; *Allee v. Medrano*, 416 US 802, 815).

In sum, this Petitioner, as all others similarly situated before the Extraordinary Term, have been deprived of the substantive right to be tried by a judge randomly chosen. Instead, He is now compelled to stand trial before the Governor's personally hand-picked judge and hand-picked Special Prosecutor, both of whom are summarily removable at the instance, will, whim or caprice of the Executive.

A litigant at the bar of criminal justice before the Extraordinary Special and Trial Term of The Supreme Court is effectively deprived of the equal protection of the laws accorded all other criminal defendants in regularly constituted terms of the Supreme Court.

In net effect, therefore, the Petitioner has no meaningful access to the state court, or "fair and sufficient opportunity for vindication of federal constitutional rights." (*Kugler v. Helfant*, ——US——, April 28, 1975).

Directly applicable is *Perez* v. *Ledema*, 401 US 27, at p. 82, wherein the Court recently stated in a concurring opinion by Brennan, White and Marshall, JJ:

> "Where the ground is bad-faith harassment, intervention is justified whether or not a state prosecution is pending. Intervention in such good cases does not interfere with the normal good-faith enforcement of state criminal law by constitutional means, and does not necessarily require a decision on the constitutionality of a state statute. It simply prevents particular unconstitutional use of the State's criminal law in bad faith against the Federal plaintiff."

In *Allee v. Medrano*, 416 US 802, *supra*, the Court recently held:

> "Isolated incidents of police misconduct under valid statutes would not, of course, be cause for the exercise of a federal court's equitable powers. . . . Where, as here, there is a persistent pattern of police misconduct, injunctive relief is appropriate."

In *Kugler v. Helfant*, ———US———, April 28, 1975, 17 CrL 3007, *supra* the Court stated:

> "...the Court in *Younger* left room for federal equitable intervention in a state criminal trial where there is a showing of "bad faith" or "harassment" by state officials responsible for the prosecution, *id.*, at 55, where the state law to be applied in the criminal proceeding is "flagrantly and patently violative of express constitutional prohibitions," *id.*, at 53, or where there exist other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."

Measured squarely by these tests, the Respondent's persistent pattern of bad-faith prosecution and extraordinary misconduct, astride the facially unconstitutional statutes at bar, clearly warranted federal intervention of Declaratory and Injunctive Relief under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution, and the redress provisions of Title 28 U.S.C. 1343 (3).

Radically distinguishable from *Kugler v. Helfant, supra*, there is here no legally constituted Court under the patently unconstitutional Section 149 Judiciary Law of New York, both as to the total lack of independence of the judiciary,

and as to the intrinsic denial of Petitioner's elemental rights of procedural due process, as compared to all other defendants of the regularly constituted criminal terms.

Unlike Kugler, supra, there is here but a single, solitary judge alone—instantly removable by the Governor—to whom Petitioner is absolutely restricted for the redress of his federal constitutional rights to a fair and impartial trial, save only for the severely limited right to apply to a Justice of the Appellate Division for discretionary authorization to present pre-trial motions before such Court, thus denying to Petitioner the equal protection of the laws.

What is fundamentally at stake in the within Petition for a Writ of Certiorari is the "imperative of judicial integrity" (*Elkins v. United States,* 364 US 206, 222; *Terry v. Ohio,* 392 US 1, 12-13).

Entrapment, in and of itself, deeply offends "the highest public policy in the maintenance of the integrity of administration . . .It is abhorrent, to the sense of justice," declared Chief Justice Charles Evans Hughes, writing for the Court in *Sorrells v. United States*, 287 US 435, 446-8.

Further, said Mr. Justice Hughes:

> ". . .such an application (entrapment) is so shocking to the sense of justice that it has been urged that it is the duty of the Court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts."

As Mr. Justice Brandeis stated in his classic dissent in *Olmstead v. United States*, 277 US 438:

> "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . .. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

HERVEY & LEGUM
Attorneys for Petitioner,
Office & P.O. Address,
16 Court Street,
Brooklyn, New York 11241
212-852-2464

DATED: May 8, 1975

AARON NUSSBAUM, of Counsel.

APPENDIX

MEMORANDUM AND ORDER

(SAME TITLE)

Appearances:

Hervey & Legum, Esqs., 16 Court Street,
Brooklyn, New York 11241
by Aaron Nussbaum, Esq., for plaintiff

Maurice H. Nadjari, Esq., Deputy Attorney General,
Special Prosecutor, 2 World Trade Center,
New York, New York 10047
by Melvin M. Dildine, Esq.,
Special Assistant Attorney General,
for defendant

This is an action to convene a three-judge court, pursuant to 28 U.S.C. §§ 2281 and 2284, seeking the following relief: (1) a declaratory judgment that the state prosecution of plaintiff is being carried out in an unconstitutional manner; and (2) an injunction barring the defendant and his agents from continuing the prosecution. Plaintiff was indicted on December 18, 1973 by the Extraordinary and Special Grand Jury for the County of Kings for the crimes of conspiracy in the third degree, attempted bribery in the second degree, and grand larceny in the second degree. He had been arrested September 25, 1973 after an investigation started by the office of the United States Attorney for the Southern District of New York and completed by defendant's office after the decision in *United States v. Archer*, 486 F. 2d 670 (2d Cir. 1973).

On January 25, 1974 the Honorable J. Irwin Shapiro, Associate Justice of the Appellate Division of the Supreme Court, Second Judicial Department, granted an order authorizing the plaintiff herein to bring certain pretrial motions before a term of the Appellate Division. Those motions, briefly summarized, requested dismissal of the pending indictment on the ground that the defendant herein, the Special Deputy Attorney General, had abused his powers with regard to the investigation and prosecution of this criminal matter; disqualification of the Honorable John M. Murtagh, presiding Justice of the Extraordinary Special and Trial Term; disqualification of Maurice H. Nadjari, the defendant herein, from conducting the prosecution; discovery; and an order impounding tapes of electronic recordings made during the course of the investigation of the plaintiff. On May 20, 1974 the Appellate Division denied all but the plaintiff's discovery motions. In adopting the concurring opinion of Justice Shapiro in *Klein v. Murtagh*, 44 App. Div. 2d 465, 355 N.Y.S.2d 622, 630 (2d Dep't 1974), the Appellate Division indicated its view that the questions raised should be decided at the trial level.

Plaintiff's allegations in the case at bar are similar to those raised before the Appellate Division. He asserts that he was unfairly "entrapped" into committing the acts which led to his indictment. Further, plaintiff claims that the prosecutors have engaged in gross misconduct in that they threatened plaintiff with the indictment before he finally was indicted and attempted to coerce him into "cooperating" with the prosecution by "setting up" Justices of the Supreme Court, Kings County and other public officials, *i.e.*, involve them in crimes similar to those he is charged with. In an affidavit in support of the motion plaintiff specifies his allegations of misconduct on the part

of defendant's agents. The defendant strenuously denies these factual allegations. The court makes no findings with respect to plaintiff's charges of prosecutorial misconduct. It does, however, share the concern of Judge Friendly in *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973) and Justice Shapiro in *Klein v. Murtagh*, 44 App. Div. 2d 465, 355 N.Y.S. 2d 622, 630 (2d Dep't 1974) (concurring opinion), that investigatory methods should not undermine the integrity of the judicial process.

Defendant opposes plaintiff's motion on the authority of *Younger v. Harris*, 401 U.S. 37 (1971) and *Samuels v. Mackell*, 401 U.S. 66 (1971). However, a three-judge court must be convened in order to dismiss on *Younger-Samuels* principles, *i.e.*, whereas the requisite bad faith enforcement or other special circumstances exist. *Steffel v. Thompson*, 42 U.S.L.W. 4357, 4359, n. 7 (March 19, 1974); *Abele v. Markle*, 452 F.2d 1121 (2d Cir. 1971).

A district court faced with an application for a three-judge court is limited to determining (1) whether the constitutional question is substantial; (2) whether the complaint at least formally alleges a basis for equitable relief, and (3) whether the case otherwise comes within the requirements of the three-judge statute. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962) (per curiam). The statute is to be narrowly construed. *Phillips v. United States*, 312 U.S. 246 (1941). Without deciding whether the first two requirements have been met, the court questions whether the three-judge statute is intended to apply to this type of case. Plaintiff argues that the statute, Executive Law § 63 (McKinney 1951) and Executive Order No. 55, under which the office of the Special Deputy Attorney General was set up, are unconstitutional *as applied* to him because agents of the Special Deputy Attorney General allegedly acted im-

properly by depriving him of his constitutional rights. Accepting the allegations as true for the purposes of this motion, *Goosby v. Osser*, 409 U.S. 512, 521, n. 7 (1973); *Nieves v. Oswald*, 477 F.2d 1109, 1112 (2d Cir. 1973), the real issue presented here is not whether the statute is unconstitutional, even as applied to the plaintiff, but rather whether acts committed by state officers appointed under the authority of a statute deprive the plaintiff of due process and warrant federal intervention under the three-judge court statute. This court must pass upon the authority of federal courts to intervene in state criminal prosecutions. When what in substance being challenged is neither a statute, nor the policy underlying the statute, but rather the activities of a state officer appointed under the authority of the statute, resort to a three-judge court is inappropriate. *Phillips v. United States*, 312 U.S. 246 (1941); *Ex Parte Bransford*, 310 U.S. 354 (1940); *Galvan v. Levine*, 490 F.2d 1255, 1258 (2d Cir. 1973). The statute and executive order under which the Special Deputy Attorney General was appointed and operates cannot be construed to authorize the alleged wrongful activities. Therefore, the policy of the three-judge court statute — to protect state statutory policy from being overturned by a single federal judge — would not be served by convening such a court here. Congress did not intend for federal courts to interfere with the execution of state statutes except where a showing is made that the statute is unconstitutional on its face or as applied; it recognized that adequate remedies exist within the states for solving problems of the type presented here. Since plaintiff has failed to fulfill the strict requirements for convening a three-judge court, his application must be denied.

The Rule 12(b)(6) motion pending, which must hereafter

be treated as a Rule 56 motion for summary judgment, is not decided. The court, however, will entertain a motion to dismiss the complaint.

s/Costantino
U.S.D.J.

MEMORANDUM AND ORDER DATED DECEMBER 6, 1974

(SAME TITLE)

Appearances:

Hervey & Legum, Esqs.,
16 Court Street, Brooklyn, New York 11241
by Aaron Nussbaum, Esq., for plaintiff

Maurice H. Nadjari, Esq.,
Deputy Attorney General, Special Prosecutor,
2 World Trade Center, New York, N.Y. 10047
by Melvin M. Dildine, Esq., Special Assistant
Attorney General, for defendant

By Memorandum and Order dated August 8, 1974 this court denied plaintiff's motion to convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. Still pending is plaintiff's suit for a declaratory judgment that the state indictment of the plaintiff is "null and void under the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution," his application for a preliminary and permanent injunction prohibiting the defendant from continuing with the prosecution of plaintiff in the state courts, and defendant's cross motion to dismiss for failure to state a claim for which relief can be granted, Rule 12(b)(6), Fed. R. Civ. P. This case presents a delicate question involving federal-state comity and requires examination of the rules enunciated by the Supreme Court in *Younger v. Harris,* 401 U.S. 37 (1971); *Samuels v. Mackell,* 401 U.S. 66 (1971), and later cases.

The essential facts were outlined in the August 8, 1974 memorandum. All that need be restated is that plaintiff alleges an abuse of discretion on the part of defendant in the investigation and prosecution of plaintiff. He contends that this case presents the "extraordinary circumstances" and "bad faith and harassment" that the Supreme Court in *Younger v. Harris*, supra, referred to as justifying the intervention of a federal court in a pending state prosecution. Defendant denies plaintiff's allegations and argues that plaintiff will have a full opportunity in the course of the state prosecution to assert any defenses and objections to the actions of the prosecutor, thereby rendering resort to this court unnecessary and inappropriate.

A brief summary of the applicable standards serves to aid an analysis of the allegations herein. Chief Justice Burger recently stated in a concurring opinion in *Allee v. Medrano*, ———U.S.———, 94 Sup. Ct. 2191, 2210 (1974);

> To meet the *Younger* test the federal plaintiff must show manifest bad faith and injury that is great, immediate, and irreparable, constituting harassment of the plaintiff in the exercise of his constitutional rights, and resulting in a deprivation of meaningful access to the state courts. The federal plaintiff must prove bad faith and requisite injury.

It is clear, then, that the *Younger* standard is an extremely strict one. This reflects the reluctance of federal courts to interfere with pending state prosecutions. The Supreme Court has not stated with specificity the type of activities which would justify a federal court in enjoining a state prosecution. In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), a pre-*Younger* decision, and the only recent case in

which the Court has held allegations sufficient to justify federal relief, the plaintiff alleged that a state prosecutor was holding public hearings and disseminating evidence which had already been ordered suppressed by a state court. The Court held that the facts alleged justified interference because the conduct of the prosecutor "chilled" plaintiff's First Amendment right to free speech and a subsequent state trial under those circumstances would not assure vindication of that right. Since *Younger* was decided, however, no set of facts has been found by the Supreme Court to justify intervention by means of an injunction of the state prosecution.

The alternative of granting declaratory relief was discussed by the Supreme Court in *Samuels v. Mackell*, 401 U.S. 66 (1971), a companion decision of *Younger*. There it was stated that in the context of a pending state prosecution a declaratory judgment would have "virtually the same practical impact as a formal injunction would." 401 U.S. at 72. The Court went on to hold that the standards for granting declaratory relief should be the same as for granting injunctive relief. There was an exception to this rule:

> There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief.

Samuels v. Mackell, 401 U.S. at 73.

A recent Third Circuit decision found that under the special facts in that case declaratory relief was called for

where enjoining a pending state prosecution was inappropriate, *Helfant v. Kugler*, 500 F.2d 1188 (3d Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3129 (U.S. August 6, 1974) (No. 74-80); cross-petition for cert. filed, 43 U.S.L.W. 3285 (U.S. August 13, 1974) (No. 74-277). The case involved the question of whether a former municipal court judge could get a fair trial where his admissions made before a grand jury may have been compelled by prior testimony given to New Jersey State Supreme Court Justices acting in their administrative capacity. The Third Circuit held that under the circumstances of the case before it, federal intervention would have a limited impact on the state prosecution. The district court was authorized to hold a hearing to determine whether the grand jury testimony was coerced and to issue a declaratory judgment if coercion were found. The court was "persuaded that any precedential value to our holding is miniscule." 500 F. 2d at 1198. This decision was reached over the strong dissent of Judge Adams in which Judges Van Dusen and Weis joined. They argued that both the policy against federal intrusion into state prosecutions and the constitutional right to a fair adjudication of guilt or innocence would be served by awaiting final disposition of the state procedures before resorting to federal courts for relief. The dissent reiterated the fear expressed in *Samuels* that declaratory relief has virtually the same impact as an injunction. The decision, both majority opinion and dissent, contains excellent commentary upon the state of the law in this difficult area.

Assuming the truth of the facts alleged by plaintiff for the purposes of this motion, it must be determined whether these facts warrant federal intrusion in light of the strong policy against it. It is clear from a reading of *Younger*, *Samuels*, and their progeny that traditional equitable

principles are to be applied in deciding whether a federal court ought to interfere with pending state prosecutions either by way of an injunction or a declaratory judgment. This involves examining the severity of the prejudice to plaintiff if the prosecution is allowed to continue as well as scrutinizing the conduct complained of. Plaintiff affirms that the expense of defending himself in the state action has forced him to go deeply into debt. The Court in *Younger*, however, made it clear that the cost, anxiety, and inconvenience of defending against a prosecution cannot "by themselves be considered 'irreparable' in the special legal sense of that term." 401 U.S. at 46. No allegation of harm comparable to that which the plaintiff suffered in *Dombrowski v. Pfister*, 380 U.S. 479 (1965) has been made.

Relying on *United States v. Archer*, 486 F.2d 670, 474-75 (2d Cir. 1973) and *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), plaintiff contends that defendant's conduct is violative of his due process rights. This court reiterates its comment in its August 8, 1974 memorandum that investigatory methods should never undermine the integrity of the judicial process. *See also Rochin v. California*, 342 U.S. 165 (1952) and *United States v. Russell*, 411 U.S. 423, 431 (1973). It should be noted, however, that *Archer* and *Toscanino* were not decided in the context presented here, *i.e.*, where a federal court is asked to interfere with a pending state prosecution. Plaintiff has a forum where he can assert these due process violations. If for some reason the state courts fail to protect his constitutional rights, resort may be had to federal relief under the habeas corpus statute, 28 U.S.C. § 2254.

Reviewing the facts as alleged in conjunction with plaintiff's claim of prejudice this court holds that to interfere with the ongoing state prosecution even by way of

holding a hearing looking towards a possible declaratory judgment would be unwise and in contravention of *Younger-Samuels* principles. The rule as expounded by the Supreme Court does not authorize federal interference where defenses and allegations of prosecutorial misconduct can be raised at the state proceeding and no prejudice other than the "cost, auxiety, and inconvenience" of defending against that prosecution is shown.

Accordingly, plaintiff's request for declaratory and injunctive relief is denied and defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted is granted. The Clerk of the court is directed to prepare an order dismissing the complaint.

s/Costantino
U.S.D.J.

AMENDED MEMORANDUM AND ORDER

(SAME TITLE)

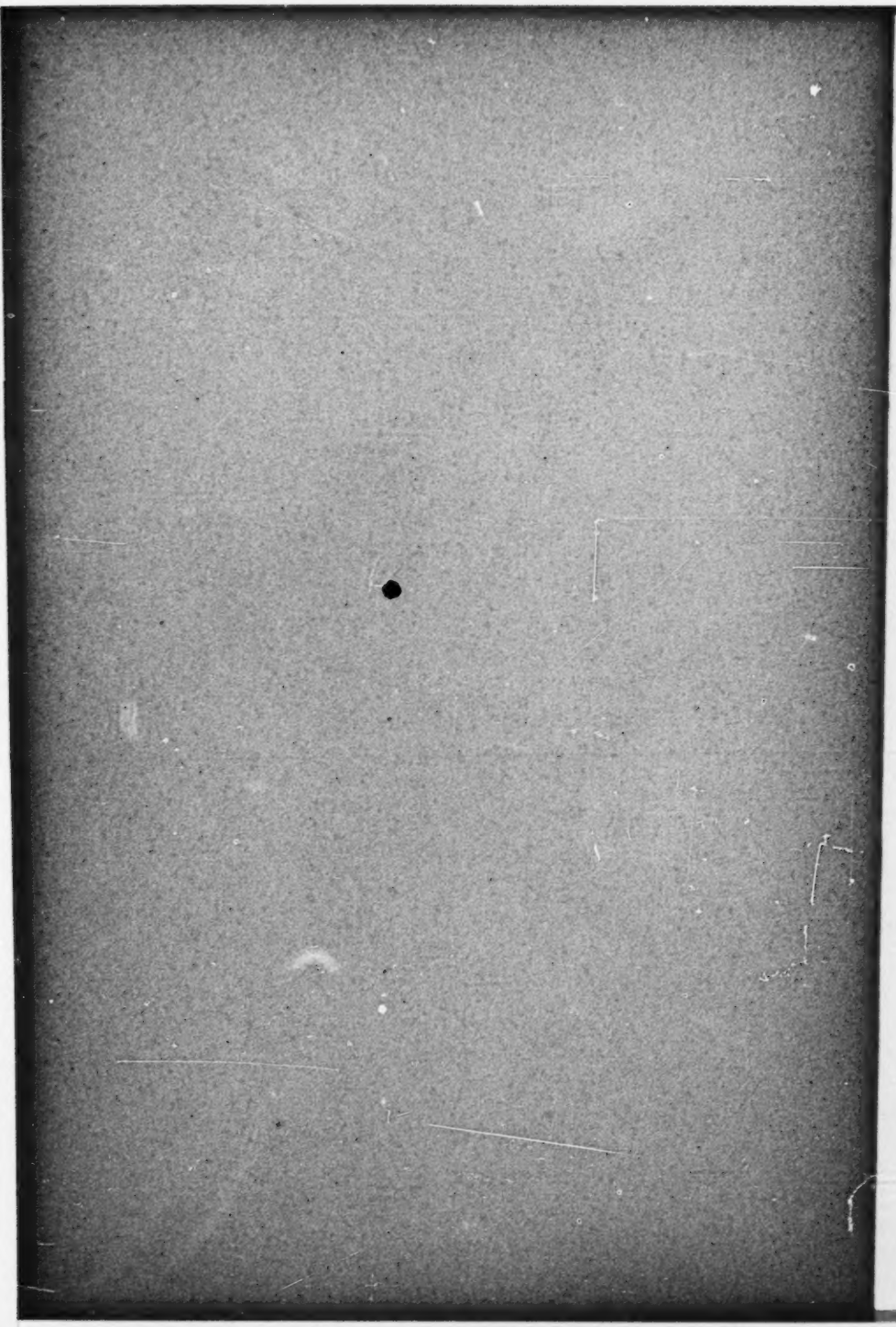
COSTANTINO, D.J.

The concluding paragraph on page 9 of the Memorandum and Order filed December 6, 1974 is amended to read as follows:

Accordingly, plaintiff's request for declaratory and injunctive relief is denied and defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted is granted. The Clerk of the court is directed to prepare *a judgment* dismissing the complaint.

So Ordered.

s/Costantino
U.S.D.J.



MAY 20
MICHAEL ROSAK, J

IN THE

Supreme Court of the United States

October Term 1974

No. 74-1425

WILLIAM STEINMAN,

Petitioner,

v.

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

Supplemental Appendix

HERVEY & LEGUM
Attorneys for Petitioner
AARON NUSSBAUM
Of Counsel
16 Court Street
Brooklyn, New York
Tel. (212) 237-1717

DICK BAILEY PRINTERS *TEL. (212) 447-5358*

TABLE OF CONTENTS

Page

Order and Judgment of United States Court of Appeals for the Second Circuit SA-1

Statement Made by the Court at Disposition of Appeal in Open Court SA-3

ORDER AND JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of April one thousand nine hundred and seventy-five.

Present: HON. IRVING R. KAUFMAN, Chief Judge; HON. J. JOSEPH SMITH, HON. WILLIAM H. TIMBERS, Circuit Judges.

William Steinman,

Plaintiff-Appellant

v.

Maurice H. Nadjari, individually and as Special Deputy Attorney General of the State of New York,

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

A true copy,
s/A. Daniel Fusaro, Clerk

STATEMENT MADE BY THE COURT AT DISPOSITION OF APPEAL IN OPEN COURT

[The following statement does not constitute a formal opinion of the Court and is not to be reported. It should not be recited or otherwise used in unrelated cases.]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Title

Docket No. 75-7025

Before: HON. IRVING R. KAUFMAN, *Chief Judge*, SMITH and TIMBERS, *Circuit Judges*.

New York, N.Y.
April 14, 1975

Statement made by the Court at disposition of appeal in open court.

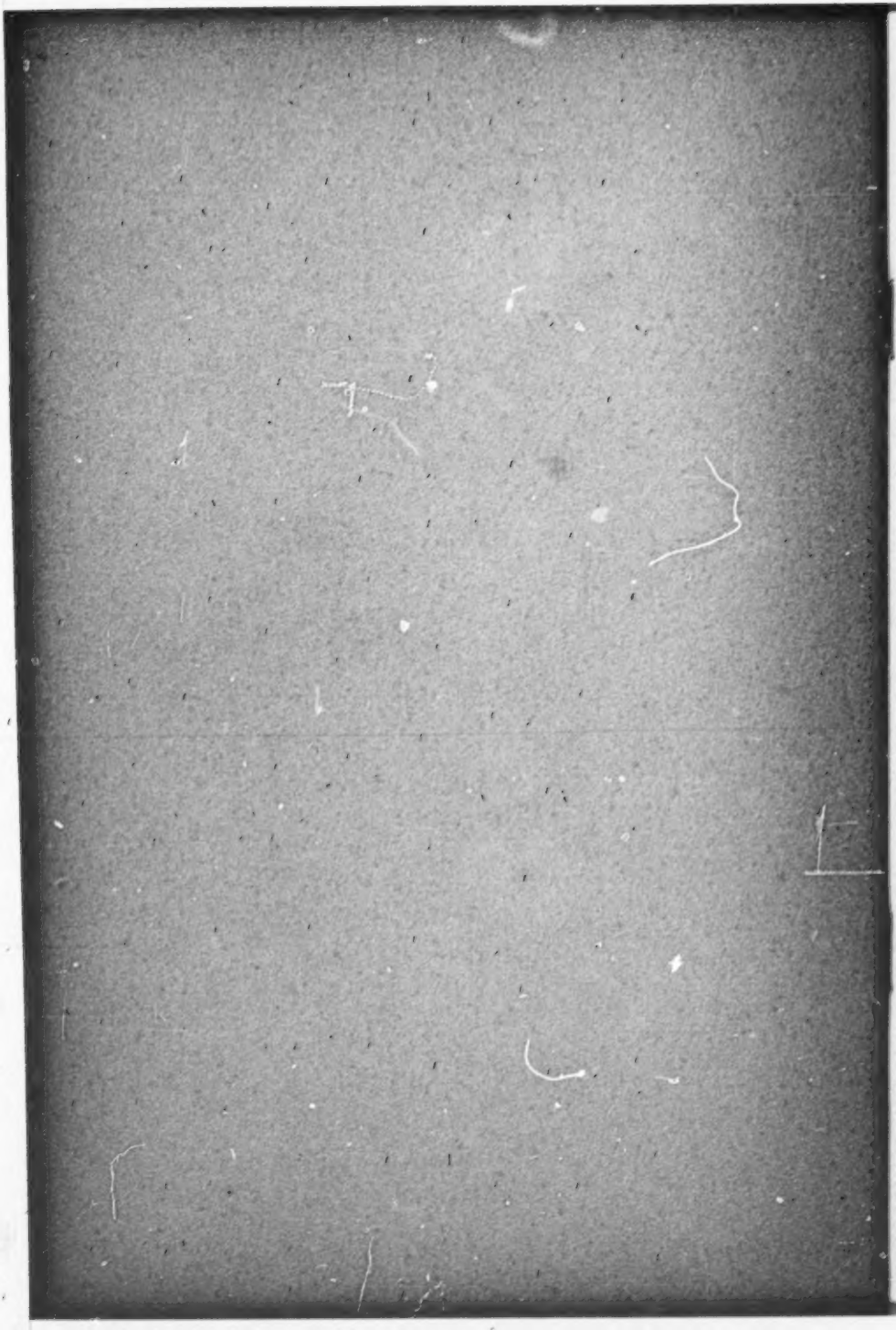
CHIEF JUDGE KAUFMAN:

It should come as no surprise that we are familiar with this area of law and, of course, familiar with the case. We affirm the district court's judgment in all respects. We see no reason why the State courts cannot fairly and fully consider Steinman's claims. The requisite showing of "bad faith" is lacking, *see, e.g., Perez v. Ledesma*, 401 U.S. 88, 95 (1971) and it is well established that the need to defend against a State criminal prosecution is not the irreparable injury which is a prerequisite to Federal intervention. *See, e.g., Younger v. Harris*, 401 U.S.

37, 46 (1971), and *Douglas v. City of Jeannette*, 319 U.S. 157, 164 (1943). Nor do we believe that the Governor's power to appoint and remove an Extraordinary Term judge or the requirement that motions to the Appellate Division can be made only by permission violate due process. *A fortiori*, they are not "extraordinary circumstances" that allow a litigant to come into the federal court in the first instance. In sum, this is a classic case for restraint in invoking federal equitable relief, out of respect for State processes. The New York courts are fully capable of protecting against alleged constitutional violations, as the recent reversal of former District Attorney Mackell's conviction demonstrates.

You also raise the point about the convocation of a three-judge court. We believe that was properly denied, for the claims relating to the constitutionality of the State statutes are frivolous.

Accordingly, we affirm the judgment of the lower court.



SUPREME COURT, U. S.

FILED

MAY 23 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1425

WILLIAM STEINMAN,

Petitioner,

against

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

MAURICE H. NADJARI
Deputy Attorney General
Special State Prosecutor
Respondent Pro Se
2 World Trade Center
New York, New York 10047
(212) 466-1250

BENNETT L. GERSHMAN
ALLEN G. SWAN
Special Assistant Attorneys General
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	3
The investigation, arrest and indictment of William Steinman	3
The proceedings in the Appellate Division	5
The instant action for injunctive and declaratory relief	6
Argument	
The proceedings below present a classic situation properly barring federal intervention in a pending state criminal prosecution	10
Conclusion	22

TABLE OF AUTHORITIES

PAGE

Cases:

Allee v. Medrano, 416 U.S. 802 (1974) 11

Bailey v. Patterson, 369 U.S. 31 (1962) 20
Baxstrom v. Herold, 383 U.S. 107 (1966) 19
Boyle v. Landry, 401 U.S. 77 (1971) 11
Byrne v. Karalexis, 401 U.S. 216 (1971) 11

Cameron v. Johnson, 390 U.S. 611 (1968) 13, 15
Canal Theatres, Inc. v. Murphy, 473 F.2d 4 (2d Cir. 1973) 14
Citizens for a Better Environment, Inc. v. Nassau County, 488 F.2d 1353 (2d Cir. 1973) 15
Coleman v. Alabama, 399 U.S. 1 (1970) 21

Dombrowski v. Pfister, 380 U.S. 479 (1965) 13, 14, 15
Douglas v. City of Jeannette, 319 U.S. 157 (1943) 15
Dreyer v. Illinois, 187 U.S. 71 (1902) 18
Dyson v. Stein, 401 U.S. 200 (1971) 11

Fenner v. Boykin, 271 U.S. 240 (1926) 13

Gajon Bar and Grill v. Kelly, 508 F.2d 1317 (2d Cir. 1974) 11
Gerstein v. Pugh, —— U.S. —— (Feb. 18, 1975) 21
Gibson v. Berryhill, 411 U.S. 564 (1973) 18
Griffin v. People of the State of Illinois, 351 U.S. 12 (1956) 19

Huffman v. Pursue, Ltd., —— U.S. —— (Mar. 18, 1975) 12

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962) 20
Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971) 12, 14

PAGE

Klein, Matter of, v. Murtagh, 44 A.D.2d 465 (2d Dept. 1974), *aff'd*, 34 N.Y.2d 988 (1974) 6, 16
Kugler v. Helfant, —— U.S. —— (Apr. 28, 1975) 12

Leslie v. Matzkin, 450 F.2d 310 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972) 14
Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971) 12

Mallory v. United States, 354 U.S. 449 (1957) 21
McNabb v. United States, 318 U.S. 332 (1943) 21
Murchison, In re, 394 U.S. 133 (1955) 18

Nigrone, Matter of, v. Murtagh, —— N.Y.2d —— (Apr. 3, 1975), *aff'g* 46 A.D.2d 343 (2d Dept. 1974) 15, 16

O'Shea v. Littleton, 414 U.S. 488 (1974) 14

People v. Davis, 67 Misc.2d 14 (Sup. Ct., Extraordinary Special and Trial Term, Ontario Co. 1971) 18
People v. Steinman, 44 A.D.2d 839 (2d Dept. 1974) 6, 13, 16
Perez v. Ledesma, 401 U.S. 87 (1971) 11, 15, 16
Phillips v. United States, 312 U.S. 246 (1941) 20

Reilly v. Doyle, 483 F.2d 123 (2d Cir. 1973) 11, 12
Reynolds, Matter of, v. Cropsey, 241 N.Y. 389 (1925) 18

Salem Inn v. Frank, 501 F.2d 18 (2d Cir. 1974) 11-12
Samuels v. Mackell, 401 U.S. 66 (1971) 11
Schlesinger v. Councilman, —— U.S. —— (Mar. 25, 1975) 12
Shaw v. Garrison, 467 F.2d 113 (5th Cir. 1972), *cert. denied*, 409 U.S. 1024 (1972) 15
Steffel v. Thompson, 415 U.S. 452 (1974) 11

Tumey v. State of Ohio, 273 U.S. 510 (1927) 18

PAGE

United States v. Archer, 486 F.2d 670 (2d Cir. 1973) 7, 15, 20
United States v. Brown, 381 U.S. 437 (1965) 18
United States v. Russell, 411 U.S. 423 (1973) 20
United States *ex rel.* Monty v. McQuillan, 385 F. Supp. 1308 (E.D.N.Y. 1974), *aff'd*, 2d Cir., Docket No. 75-2012 (May 1, 1975) (no opinion) 17, 18

Watson v. Buck, 313 U.S. 387 (1941) 14, 16, 20
Williams v. Oklahoma City, 395 U.S. 458 (1969) 19

Younger v. Harris, 401 U.S. 37 (1971) 11, 12, 13, 14, 16, 20

Constitutions, Statutes, Orders:

Executive Orders of the Governor of New York:

Number 55, 9 NYCRR 1.55 ..... 7, 9
Number 58, 9 NYCRR 1.58 ..... 10–11, 19
Number 64, 9 NYCRR 1.64 17

New York Constitution (McKinney 1969):

Article VI, section 27 ..... 9, 10, 16, 17, 20
Article XIX, section 1 19

New York Criminal Procedure Law (McKinney 1971):

Section 140.20 21
Section 180.60 21
Section 180.70 21
Section 210.20 13
Section 210.45 13
Section 440.10 14

New York Executive Law (McKinney 1972):

Section 63 ..... 7, 8, 9, 10, 11, 19, 20

PAGE

New York Judicial Conference Rules:

22 NYCRR 33.3(c) 18

New York Judiciary Law (McKinney 1968):

Section 14 18
Section 149 ..... 5, 8, 9, 10, 16, 17, 19, 20

New York Penal Law (McKinney 1967):

Section 40.05 ..... 13, 20
Section 105.05 4
Section 110.00 4
Section 155.35 4
Section 200.00 4

United States Constitution:

Article IV, section 4 18–19
Fifth Amendment 6
Fourteenth Amendment 6

United States Statutes:

28 U.S.C. §1254(1) 2
28 U.S.C. §2281 20
28 U.S.C. §2284 20
Fed. R. Civ. P. 56 11
Fed. R. Crim. P. 5 21
Fed. R. Crim. P. 5.1 21

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1425

WILLIAM STEINMAN,

Petitioner,

against

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

Petitioner William Steinman seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered April 14, 1975, unanimously affirming a judgment of the United States District Court for the Eastern District of New York, entered December 12, 1974, dismissing petitioner's complaint for de-

claratory and injunctive relief to bar a pending criminal prosecution against him in the Extraordinary Special and Trial Term of the New York State Supreme Court, Kings County.

Opinions Below

The unreported opinions of the United States District Court for the Eastern District of New York are reprinted in the appendix to the Petition at pages A-1-12. The judgment and oral opinion of the United States Court of Appeals for the Second Circuit are reprinted in the supplemental appendix to the Petition at pages SA-1-4.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 14, 1975, and the Petition was filed within 90 days of that date. Petitioner invokes this Court's certiorari jurisdiction pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether a defendant in a pending state criminal prosecution is barred from enjoining his prosecution on the grounds of alleged prosecutorial misconduct and the alleged unconstitutionality of various state statutes when those same issues may be raised in his state trial and in the state appellate courts.

Statutes Involved

The pertinent federal and state constitutional and statutory provisions are set forth in the Petition at pages 3-9.

Statement of the Case

The investigation, arrest and indictment of William Steinman*

In the early part of 1973, members of the Office of the United States Attorney for the Southern District of New York learned from Nicholas DiStefano, a federal informant, that petitioner William Steinman, Administrative Assistant to the Comptroller for the State of New York, had agreed to receive money to illegally influence the actions of public agencies and officials (Federman affidavit, June 25, 1974, p. 49).** The United States Attorney began an investigation of Steinman with the cooperation of the New York City Police Department (*ibid.*). Pursuant to this investigation, the prosecutors caused Virginia Morgan, a federal agent, to be arrested in Kings County for the crime of possession of a weapon (*id.* at 42). Thereafter, from February 20, 1973, until September, 1973, DiStefano, working as an undercover agent, met with Steinman several times concerning disposition of the Morgan case (*id.* at 49-50).

In August, 1973, the United States Attorney determined that the investigation fell within the jurisdiction of state law enforcement agencies, and transferred it to the office of respondent, Maurice H. Nadjari, the Special

* Many of the facts in this case, including the circumstances of the arrest and indeed the guilt or innocence of petitioner, are subject to dispute, and have yet to be resolved at evidentiary hearings at the state level.

** Parenthetical page references, unless otherwise indicated, are to the appendix filed by petitioner in the Court of Appeals. In the event that the original record and not the appendix is transmitted to this Court, the documents referred to in these pages are also identified.

State Prosecutor (*id.* at 50). The investigation then continued, partly with the use of court-ordered wiretaps (*id.* at 50-51). Finally, on September 25, 1973, Steinman was discovered near the Kings County Supreme Court House with $5,000 in cash in his pocket (*id.* at 51). According to the affidavit of Special Assistant Attorney General Mark Federman, Steinman at first agreed to furnish the prosecutors with information on corruption within the New York City criminal justice system; in December, 1973, he refused to cooperate further (*id.* at 51-52).

By an indictment filed December 18, 1973 (*id.* at 52), the Extraordinary Special Grand Jury for the County of Kings charged Steinman with the crimes of conspiracy in the third degree [N. Y. Penal Law §105.05 (McKinney 1967)], attempted bribery in the second degree [N. Y. Penal Law §§110.00, 200.00 (McKinney 1967)] and grand larceny in the second degree [N. Y. Penal Law §155.35 (McKinney 1967)] (Indictment No. S.P.O. K-6/1973, pp. 42-44). Specifically, the indictment alleged that, after Virginia Morgan had been arrested, Steinman had conspired with others to receive $10,000, some of which would be paid as bribes to members of the criminal justice system and to two political district leaders to influence the outcome of the Morgan case (*id.* at 42). Pursuant to this conspiracy, the indictment alleged, Steinman engaged in a series of overt acts, in which he had discussed the Morgan case with an unidentified individual (February 20, 1973), stated that he would contact a public official in the criminal justice system, who would affect the Morgan case (May 21, 1973), obtained a list of officials in the criminal justice system in Kings County (May 21) and displayed such a

list to another person (May 29), spoke to a public official in the criminal justice system concerning the Morgan case (July 3), received $1,000 in cash at a restaurant (August 13), stated that he had met and conferred with a second public official (August 14), discussed the Morgan case with a third official (August 16), stated that he had spoken to two political district leaders concerning the case (September 6), and received $5,000 in cash near the Kings County Supreme Court House (September 20) (*id.* at 43).

The proceedings in the Appellate Division

By permission granted January 25, 1974, pursuant to section 149, subdivision 2, of the New York Judiciary Law, Steinman moved in the Appellate Division of the New York Supreme Court, Second Department, for an order dismissing the indictment in the interest of justice, dismissing the indictment on the ground that the Special Prosecutor had abused his statutory power and authority, disqualifying the justice of the Extraordinary Special and Trial Term of the Supreme Court from presiding at his trial, superseding and disqualifying the Special Prosecutor from prosecuting his case, granting discovery, and impounding tape recordings of intercepted conversations (Nussbaum affidavit, June 10, 1974, pp. 26-28). On the issue of prosecutorial misconduct and abuse of power, Steinman alleged that the Special Prosecutor had entrapped him by use of a "manufactured" crime (*id.* at 29-33), that he had released to the press portions of the prosecutor's brief and affidavit in the Appellate Division in apparent violation of an order of that court that the papers before it be sealed (*id.* at 35-36), and that a member of the prosecutor's staff,

during oral argument, had misrepresented to the Appellate Division that former Chief Judge FULD of the New York State Court of Appeals had sanctioned the use of "mock arrests," when in fact the judge had not done so (*id.* at 36-37).

The Appellate Division granted partial discovery and denied the rest of the motion, citing the concurring opinion of Mr. Justice SHAPIRO in *Matter of Klein* v. *Murtagh*, 44 A.D.2d 465, 473-74 (2d Dept. 1974), *aff'd*, 34 N.Y. 2d 988 (1974), that questions of prosecutorial misconduct should be decided at the trial level. *People* v. *Steinman*, 44 A.D.2d 839 (2d Dept. 1974). Steinman has since made a motion in the trial court to dismiss the indictment on, for the most part, the same grounds of prosecutorial misconduct. That motion is still pending.

The instant action for injunctive and declaratory relief

After denial of the motion by the Appellate Division and referral of the matter to the trial court, Steinman brought a civil rights action in the United States District Court for the Eastern District of New York on essentially the same grounds raised in the Appellate Division and requested declaratory judgment, a permanent injunction and the convening of a three-judge court to dismiss his "indictment as null and void under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution" (complaint, pp. 2-9). Through a series of affidavits submitted by Steinman and his counsel, Steinman made allegations of entrapment, specifically that the Special Prosecutor had engaged in a "mock arrest" (Steinman affidavit, June 10, 1974, pp. 13-15; Nussbaum affidavit, June 10, 1974, pp.

29-33; Nussbaum reply affidavit, June 27, 1974, pp. 56-57; Nussbaum affidavit, Jul. 12, 1974, pp. 73-78) and that the Special Prosecutor and the United States Attorney for the Southern District of New York had attempted to coerce him into entrapping other public officials (Steinman affidavit, June 10, 1974, pp. 15-19; Nussbaum reply affidavit, June 27, 1974, p. 58; Steinman reply affidavit, June 27, 1974, pp. 62-67). Steinman further alleged that between his arrest and the indictment he had been denied a preliminary hearing as required by state law (Nussbaum reply affidavit, June 27, 1974, p. 58), that the Special Prosecutor had improperly released to the press portions of papers which the prosecution had submitted in the Appellate Division (Nussbaum affidavit, June 10, 1974, pp. 35-36; Nussbaum reply affidavit, June 27, 1974, p. 58), and that Chief Special Assistant Attorney General Joseph A. Phillips had misrepresented former Chief Judge FULD's approval of the arrest procedure both in the instant case in the Appellate Division and as *amicus curiae* in the United States Court of Appeals in *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973) (Nussbaum affidavit, June 10, 1974, pp. 36-37; Nussbaum reply affidavit, June 27, 1974, pp. 58-60; Nussbaum affidavit, Jul. 12, 1974, pp. 78-79; Nussbaum affidavit, Jul. 17, 1974, and exhibits, pp. 80-83).

Steinman also claimed that the Special Prosecutor had abused his authority under section 63 of the New York Executive Law and the Governor's Executive Order Number 55, and that therefore those provisions were unconstitutional as applied (Nussbaum affidavit, June 10, 1974, pp. 31-32; Nussbaum reply affidavit, June 27, 1974, pp. 55-56). Finally, he asserted that the Special Prosecutor and

the trial judge should be disqualified pursuant to section 63 of the New York Executive Law and section 149 of the New York Judiciary Law, respectively (Nussbaum affidavit, June 10, 1974, pp. 33-35). He submitted that he was irreparably injured because the trial judge could not be impartial in light of his "official association" with the Special Prosecutor (Nussbaum affidavit, June 10, 1974, pp. 37-38).

The Special Prosecutor moved to dismiss the complaint for failure to state a claim on which relief could be granted (notice of motion, p. 45). In a series of affidavits submitted by Chief Special Assistant Attorney General Joseph A. Phillips, Special Assistant Attorney General Mark I. Federman and Assistant United States Attorney Rudolph W. Giuliani, the Special Prosecutor argued that Steinman had not been entrapped (Giuliani affidavit, June 25, 1974, pp. 46-48; Federman affidavit, June 25, 1974, pp. 51-52; Phillips reply affidavit, Jul. 8, 1974, pp. 68-72), but that, in any event, the questions of prosecutorial misconduct should be resolved in the pending state prosecution, which had been brought in good faith (Phillips affidavit, June 25, 1974, pp. 53-54; Phillips reply affidavit, Jul. 8, 1974, p. 68). Mr. Phillips further stated that the information he had supplied to the Appellate Division on oral argument, to the effect that Judge FULD had approved the investigative technique in a discussion with the United States Attorney, was an inadvertent error and that he had corrected the error by submitting a letter to that court (Phillips affidavit, June 25, 1974, p. 54).

On June 27, 1974, in an oral argument before the United States District Court for the Eastern District of New York (CONSTANTINO, J.), Steinman, through counsel, contended

that a three-judge panel should be convened because the Special Prosecutor, in light of his alleged misconduct, had exceeded his authority under section 63 of the New York Executive Law and under the Governor's executive order. Counsel also noted that section 149 of the New York Judiciary Law, which provides that the Governor may appoint a Supreme Court justice to preside at an extraordinary special and trial term, is unconstitutional because it violates the federal separation of powers doctrine. By a memorandum and order dated August 8, 1974, Judge CONSTANTINO denied the application for a three-judge court on the ground that the constitutionality of the provisions cited in the complaint, to wit, section 63 of the New York Executive Law and Executive Order Number 55, had not been challenged. The court invited further briefs on the Special Prosecutor's outstanding motion to dismiss the complaint, to be thereafter treated as a motion for summary judgment. Petition, pp. A-1-5.

Both sides submitted further memoranda of law on the motion. Steinman, through counsel, filed an additional affidavit challenging the constitutionality of article VI, section 27, of the New York State Constitution and its implementing statute, section 149 of the New York Judiciary Law. He asserted that the state prosecution subjected him to irreparable injury because he was "without financial resources" to defend his case (Nussbaum supplemental affidavit, Oct. 15, 1974, pp. 94-96).

By a memorandum and order dated December 6, 1974, and an amended memorandum and order dated December 10, 1974, Judge CONSTANTINO granted the Special Prose-

cutor's motion to dismiss the complaint on the ground that the questions presented in the action could be resolved in the state proceeding. Petition, pp. A-6-12. On December 12, 1974, judgment was entered dismissing the complaint.

On appeal to the United States Court of Appeals for the Second Circuit, petitioner argued that the denial of his application for a three-judge court and the subsequent dismissal of his complaint were erroneous. The Court of Appeals (KAUFMAN, C.J., SMITH and TIMBERS, JJ.) unanimously affirmed the judgment of the District Court on April 14, 1975. Petition, pp. SA-1-4.

ARGUMENT

The proceedings below present a classic situation properly barring federal intervention in a pending state criminal prosecution.

Petitioner brought an action in the United States District Court for declaratory and injunctive relief to stay his state criminal proceeding on the grounds of prosecutorial misconduct, to wit, entrapment, failure to provide petitioner a preliminary hearing, releasing to the press court papers in apparent violation of a state court order, and misleading the Appellate Division on what former Chief Judge FULD said concerning the prosecution's investigative techniques. During the course of the proceeding, petitioner tangentially challenged the constitutionality of several state provisions. N.Y. CONST. art. VI, §27 (McKinney 1969); N.Y. Judiciary Law §149(1) (McKinney 1968); N.Y. Executive Law §63 (McKinney 1972); Exec.

Order No. 58, 9 NYCRR 1.58.* After denying an initial application for the convening of a three-judge court and receiving affidavits and memoranda of law submitted by both parties,** the District Court held that Steinman had not demonstrated the irreparable injury necessary to allow federal intervention in a pending state prosecution and granted respondent's motion to dismiss the complaint. Petition, pp. A-6-12. The United States Court of Appeals for the Second Circuit affirmed the dismissal. Petitioner seeks a writ of certiorari to review that decision.

It is now well established that, with few exceptions, a federal court, as a matter of comity, should dismiss an action for declaratory and injunctive relief when the claims submitted may be raised in a pending state criminal prosecution. *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 87 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971); *Gajon Bar and Grill* v. *Kelly*, 508 F. 2d 1317 (2d Cir. 1974); *cf. Allee* v. *Medrano*, 416 U.S. 802 (1974); *Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Salem Inn* v. *Frank*, 501

* Erroneously cited in the complaint as Executive Order Number 55, 9 NYCRR 1.55, by which the Governor, pursuant to section 63 of the New York Executive Law, gave the Attorney General and his deputy, the respondent herein, power to prosecute cases of official corruption in the criminal justice system in New York County. The correct order in issue, number 58, is an identical order applying to Kings County.

** In its decision of December 6, 1974, the District Court granted the Special Prosecutor's motion to dismiss the complaint and, in so doing, assumed the truth of the facts alleged by petitioner. Petition, p. A-9. However, since the court examined papers submitted by both parties and had earlier stated that it would treat the Special Prosecutor's motion to dismiss as one for summary judgment, the court's decision may be viewed as having granted summary judgment in favor of the Special Prosecutor. Petition, pp. A-4-5; *see* FED. R. CIV. P. 56; *Reilly* v. *Doyle*, 483 F. 2d 123, 125, n. 2 (2d Cir. 1973).

F. 2d 18 (2d Cir. 1974). This rule applies no matter whether the underlying basis for the claim is the unconstitutionality of a state statute or the misconduct of state officials. *See Kugler* v. *Helfant*, —— U.S. —— (Apr. 28, 1975); *Reilly* v. *Doyle*, 483 F. 2d 123, 128 (2d Cir. 1973); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F. 2d 12, 22 (2d Cir. 1971); *Lewis* v. *Kugler*, 446 F. 2d 1343, 1348 (3d Cir. 1971). When a state prosecution is pending, federal intervention is only allowed when the plaintiff has shown that he faces great and immediate injury [*Younger* v. *Harris, supra* at 46], or that the prosecution has been brought in bad faith or merely to harass the plaintiff [*id.* at 49], or that other "extraordinary circumstances" exist which require intervention. *Id.* at 53-54. Recently, this Court has expanded these rules to proceedings other than state criminal prosecutions. *Schlesinger* v. *Councilman*, —— U.S. —— (Mar. 25, 1975) (military court-martial); *Huffman* v. *Pursue, Ltd.*, —— U.S. —— (Mar. 18, 1975) (state civil proceeding akin to criminal prosecution).

The decisions of the courts below, barring federal intervention in this case, clearly follow the precepts of *Younger* v. *Harris, supra*, and subsequent cases and in no way conflict with the holdings of other federal courts. Indeed, petitioner has failed to indicate how the instant case is of such a unique character as to require review by this Court. Quite the contrary, a brief analysis of the prerequisites for federal intervention in light of petitioner's claims indicates the correctness of the denial of relief by the District Court.

The "traditional prerequisite to obtaining an injunction" is a showing of irreparable injury which is "both great and immediate." *Younger* v. *Harris, supra* at 46;

Fenner v. *Boykin*, 271 U.S. 240, 243-44 (1926). One aspect of such injury is the lack of an adequate remedy in the state proceedings by which the federal plaintiff may assert his claim. *Younger* v. *Harris, supra* at 48-50. Most of the same claims which petitioner submitted in the District Court have been included in an omnibus motion to dismiss the indictment on jurisdictional grounds and in the interest of justice. *See* N. Y. Criminal Procedure Law §210.20 (McKinney 1971). That motion is now pending in the state trial court pursuant to the directive of the Appellate Division. *See People* v. *Steinman*, 44 A.D.2d 839 (2d Dept. 1974). In turn, it is "generally to be assumed that state courts and prosecutors will observe constitutional limitations" and that the "mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Dombrowski* v. *Pfister*, 380 U.S. 479, 484-85 (1965); *see Cameron* v. *Johnson*, 390 U.S. 611, 621 (1968). Here, the state trial court will presumably rule correctly on the questions of law and will hold, if necessary, an evidentiary hearing to determine factual issues relevant to those portions of the motion concerning prosecutorial misconduct. *See* N.Y. Criminal Procedure Law §210.45(6) (McKinney 1971).

Moreover, petitioner's allegation of prosecutorial misconduct as it relates to the affirmative defense of entrapment will be presented to and decided by the trial jury in its determination of petitioner's guilt or innocence. N. Y. Penal Law §40.05 (McKinney 1967). Further, all those issues raised in the trial court, including that of the trial judge's alleged bias, may be subject to full review by judg-

ment appeal in the Appellate Division and again in the New York Court of Appeals, by post-conviction remedy [*see* N. Y. Criminal Procedure Law §440.10 (McKinney 1971)], by certiorari in this Court, and by habeas corpus and additional appeal in the federal courts. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Watson* v. *Buck*, 313 U.S. 387, 401 (1941); *Canal Theatres, Inc.* v. *Murphy*, 473 F. 2d 4, 6 (2d Cir. 1973); *Leslie* v. *Matzkin*, 450 F. 2d 310 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972).

A federal plaintiff could also demonstrate great and immediate injury by showing that prosecutorial misconduct is presently continuing and thus may not be subject to attack in a pending case unrelated to the misconduct. *See, e.g., Dombrowski* v. *Pfister, supra* (police continued to threaten prosecution, even though vital evidence was ordered suppressed by a state court); *Inmates of Attica Correctional Facility* v. *Rockefeller, supra* (injunctions only allowed against continuing brutality in state prison). In the instant case, petitioner alleged no continuing misconduct. All the alleged misconduct has already occurred and is subject to challenge in the state prosecution. Again, no irreparable injury is indicated.

The second ground for federal intervention is a showing that the state prosecution has been brought in bad faith or to harass the party seeking relief. *Younger* v. *Harris, supra* at 49. Petitioner urged, more specifically in the Court of Appeals than in the District Court, that the instant prosecution has been brought in bad faith, and, in this respect, he pointed to his allegations of prosecutorial misconduct. Bad faith or harassment prosecutions, however, have been specifically defined as those brought "without hope of obtain-

ing a valid conviction" [*Perez* v. *Ledesma, supra* at 85] or with "no intention of pressing the charges * * *, knowing that [the defendant] did not violate the [criminal] statute." *Cameron* v. *Johnson, supra* at 619-20. In other words, the prosecution must be shown to have a "sham case." *Citizens for a Better Environment, Inc.* v. *Nassau County,* 488 F. 2d 1353, 1360 (2d Cir. 1973); *see, e.g., Dombrowski* v. *Pfister, supra; Shaw* v. *Garrison,* 467 F. 2d 113 (5th Cir. 1972), *cert. denied,* 409 U.S. 1024 (1972). No such showing has been made of the instant state prosecution, where it is undisputed that the acts alleged in the indictment would, if proved, constitute conspiracy, attempted bribery and grand larceny.

It is necessary to point out that the tactics allegedly used by the prosecution here, specifically by the United States Attorney before the case was transferred to the Special State Prosecutor for lack of federal jurisdiction—*i.e.*, employing a fictitious indictment to investigate corruption in the criminal justice system—have been questioned in other cases. *See, e.g., Matter of Nigrone* v. *Murtagh,* —— N.Y.2d —— (Apr. 3, 1975), *aff'g* 46 A.D.2d 343 (2d Dept. 1974); *United States* v. *Archer,* 486 F.2d 670 (2d Cir. 1973). But, while not the case here, even a prosecution brought upon a clear constitutional infirmity does not constitute bad faith. *See Douglas* v. *City of Jeannette,* 319 U.S. 157 (1943) (no bad faith even though prosecution was brought under a statute found unconstitutional by this Court). The state court is still assumed to "observe constitutional limitations." *Dombrowski* v. *Pfister, supra* at 484-85.

Moreover, unlike the situation in *Douglas* v. *City of Jeannette, supra,* the constitutional propriety or impro-

priety of the prosecutorial tactics used here is far from clear. And, indeed, the state appellate courts have overwhelmingly found, both in petitioner's and other cases, that such questions of prosecutorial misconduct should be resolved at the trial level. *Matter of Nigrone* v. *Murtagh, supra; People* v. *Steinman, supra; Matter of Klein* v. *Murtagh,* 44 A.D. 465, 473-74 (2d Dept. 1974) (SHAPIRO, J., concurring), *aff'd,* 34 N.Y. 2d 988 (1974). Petitioner's claims thus should await further adjudication in the trial court, both as a ground for dismissal and as a statutory defense. It cannot be said that the prosecution has been brought "without hope of obtaining a valid conviction." *Perez* v. *Ledesma, supra* at 85.

The last exception to the bar to federal intervention was defined in *Younger* v. *Harris, supra* at 53-55, as "extraordinary circumstances," an example of which was there given in a quotation from *Watson* v. *Buck, supra* at 402:

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

None of the statutes challenged by petitioner presents such an infirmity.

Petitioner's first attack is directed at article VI, section 27, of the New York State Constitution and its implementing statute, section 149, subdivision 1, of the New York Judiciary Law, both of which provide that the Governor may, when "the public interest requires," appoint one or more extraordinary special and trial terms of the

New York Supreme Court and may name "the justice who shall hold the term"; further, the Governor "may terminate the assignment of the justice and may name another justice in his place to hold the term." N.Y. CONST. art. VI, §27 (McKinney 1969); N.Y. Judiciary Law §149 (1) (McKinney 1968). By this procedure, the Governor, as he did at the same time in the other four counties of New York City, established the Extraordinary Special and Trial Term of the Supreme Court, Kings County, for the trial of cases brought by the Special Prosecutor, and named Mr. Justice JOHN M. MURTAGH to preside at the term. Exec. Order No. 64, 9 NYCRR 1.64. Petitioner claims that this procedure allows the Governor to appoint and remove a judge at will and thus violates the separation of powers doctrine of the United States Constitution and the independence of the judiciary. He is wrong.

To begin with, at least one federal court having an opportunity to discuss this procedure on the merits has found it to comply with due process standards. *United States ex rel. Monty* v. *McQuillan*, 385 F. Supp. 1308 (E.D.N.Y. 1974), *aff'd*, 2d Cir., Docket No. 75-2012 (May 1, 1975) (no opinion). Moreover, with respect to the trial justice, the Governor's power consists only of appointment, when the public interest requires, and removal, presumably when the assigned justice has become unable or unwilling to continue in his position. Further, the power of terminating the assignment and naming another justice to hold the term has not even been exercised as to this Extraordinary Term.* And for the Governor to abuse his authority and

* Interestingly, it was petitioner himself who sought to have this power of removal invoked, albeit improperly, in his motion before the Appellate Division and, by inference, in the District Court below (Nussbaum affidavit, June 10, 1974, pp. 33-35).

make his appointments for any purpose other than in the public interest would be a "violation of [the] law" under attack. *People* v. *Davis*, 67 Misc. 2d 14, 16 (Sup. Ct., Extraordinary Special and Trial Term, Ontario Co. 1971).

In sum, the extraordinary term is "to be conducted in accordance with the rules of law governing all the other terms of court with the exception of the designation of the judge." *Matter of Reynolds* v. *Cropsey*, 241 N.Y. 389, 395 (1925). The procedure in no way creates a tribunal with a built-in personal or pecuniary interest in the outcome of a trial. *Cf. Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *In re Murchison*, 394 U.S. 133 (1955); *Tumey* v. *State of Ohio*, 273 U.S. 510 (1927). Indeed, if the trial judge is unbiased, petitioner would have no ground to complain. *United States ex rel. Monty* v. *McQuillan*, *supra* at 1311. And if the judge is biased against petitioner, the latter has an adequate remedy at state law for seeking the judge's disqualification. N.Y. Judiciary Law §14 (McKinney 1968); 22 NYCRR 33.3(c) (N.Y. Judicial Conference).

Petitioner's additional argument that this state procedure of establishing an extraordinary term violates the separation of powers doctrine of the United States Constitution is likewise without merit. The Constitution contains no requirement that the structure of state governments conform exactly to the structure of the national government; the federal separation of powers doctrine does not apply to the states. *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902); *cf. United States* v. *Brown*, 381 U.S. 437, 442-43 (1965). In fact, all that the Constitution requires of each state is a "Republican Form of Government" [U.S. Const.

art. IV, §4], the existence of which here is demonstrated by the fact that the People of the State of New York themselves voted to adopt the very state constitutional provision under attack. *See* N.Y. CONST. art. XIX, §1 (McKinney 1969).

Another challenged statute, section 149, subdivision 2, of the New York Judiciary Law, provides that the Appellate Division, in its discretion, may hear a motion addressed to an extraordinary special and trial term. The existence of such discretion does not, as petitioner claims, deny him equal protection of the law. For the use of sound judicial discretion is not uncommon to state or federal courts in setting bail, imposing sentence or granting leave to appeal, or to this Court in granting certiorari. Finally, there is no showing that the Appellate Division has practiced invidious discrimination or unreasonable distinctions in deciding whether to entertain a pre-trial motion. *Cf. Williams* v. *Oklahoma City*, 395 U.S. 458 (1969); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Griffin v. People of the State of Illinois*, 351 U.S. 12 (1956).

The last challenged statute, section 63, subdivision 2, of the New York Executive Law, provides that the Attorney General or one of his deputies (in this case, the Special State Prosecutor, pursuant to the Governor's Executive Order Number 58, 9 NYCRR 1.58), shall, upon request of the Governor, supersede a local district attorney, and prosecute a certain case or class of cases. Petitioner's argument that the Special Prosecutor abused his authority by engaging in various forms of misconduct is not a challenge to the constitutionality of a statute, but is merely a reword-

ing of his challenge to respondent's conduct.* *See Phillips* v. *United States*, 312 U.S. 246, 252 (1941).

In sum, the state provisions challenged are not "violative of express constitutional prohibitions in every clause, sentence and paragraph" as to create an extraordinary circumstance calling for federal intervention. *Younger* v. *Harris, supra* at 53-55; *Watson* v. *Buck, supra* at 402. Any challenge to their constitutionality should be made in the state court, and petitioner has made such a challenge in his pending motion to dismiss the indictment.

Finally, it should be noted that the constitutional nature of petitioner's claims of prosecutorial misconduct is highly questionable and may in fact be "nonexistent," thereby depriving him of any ground for a civil rights complaint. *See Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962). Thus, the investigative techniques allegedly used may well involve only the "nonconstitutional" defense of entrapment. *United States* v. *Russell*, 411 U.S. 423, 432-33 (1973); *see* N.Y. Penal Law §40.05 (McKinney 1967). And even if the defense here is a due process claim, the District Court correctly noted that *United States* v. *Archer, supra*, was "not decided in the context presented here, *i.e.*, where a federal

---

* At the time the District Court entertained petitioner's application for a three-judge court, section 63 of the New York Executive Law was the only challenged state statute included in petitioner's papers. But since the allegation was directed at the Special Prosecutor's conduct and not at the constitutionality of a state statute, the application was properly denied, since it did not conform to the three-judge statute. Petition, pp. A-1-5; 28 U.S.C. §§2281, 2284. When petitioner subsequently submitted his challenges to article VI, section 27, of the New York Constitution and section 149 of the New York Judiciary Law, the District Court properly refrained from reconsidering the application since the constitutional questions were clearly not substantial as to warrant the convening of a three-judge panel. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962). The Court of Appeals affirmed this decision, finding that the "claims relating to the constitutionality of the State statutes are frivolous." Petition, p. SA-4.

court is asked to interfere with a pending state prosecution. Plaintiff has a forum where he can assert these due process violations." Petition, p. A-10. Petitioner's further allegation that he was not, before indictment, afforded a prompt arraignment or preliminary hearing concerns a violation, if any, of state, not constitutional, law. *See* N.Y. Criminal Procedure Law §§140.20, 180.60, 180.70 (McKinney 1971); *cf. Mallory* v. *United States,* 354 U.S. 449 (1957); *McNabb* v. *United States,* 318 U.S. 332 (1943); FED. R. CRIM. P. 5, 5.1. Whatever the meaning of his statements in the District Court that he was held "incommunicado," it was never asserted that during the three months before indictment, when the prosecution sought his cooperation in investigating corruption, he was incarcerated in jail or physically prevented from seeing an attorney. *Cf. Gerstein* v. *Pugh,* —— U.S. —— (Feb. 18, 1975); *Coleman* v. *Alabama,* 399 U.S. 1 (1970). Rather, it appears that his indictment was delayed for a determination of whether he would become an informant; throughout that time he remained at liberty, as he does now. Additionally, no constitutional questions are involved in an apparent violation of a state court order to seal court papers or in an obvious misunderstanding over what the former Chief Judge said to whom. All these questions may and should be resolved in the state court.

Petitioner demonstrated none of the extraordinary circumstances required to invoke federal intervention into a pending state criminal prosecution. As the Court of Appeals correctly perceived, "this is a classic case for restraint in invoking federal equitable relief, out of respect for State processes." Petition, p. SA-4. The dismissal of the complaint was in full accord with the guidelines established by this Court and in harmony with the principles of federalism. Petitioner's claim is thus not sufficiently substantial to warrant the granting of a writ of certiorari.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MAURICE H. NADJARI
Deputy Attorney General
Special State Prosecutor

BENNETT L. GERSHMAN
ALLEN G. SWAN
Special Assistant Attorneys General
Of Counsel

May, 1975.

MAY 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1425

WILLIAM STEINMAN,

Petitioner,

-v-

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONER'S REPLY BRIEF

HERVEY & LEGUM
Attorneys for Petitioner
AARON NUSSBAUM
of Counsel
16 Court Street
Brooklyn, New York 11201

Tel. (212) 237-1717

Dick Bailey Printers P.O. Box X, Staten Island, N.Y. 10302

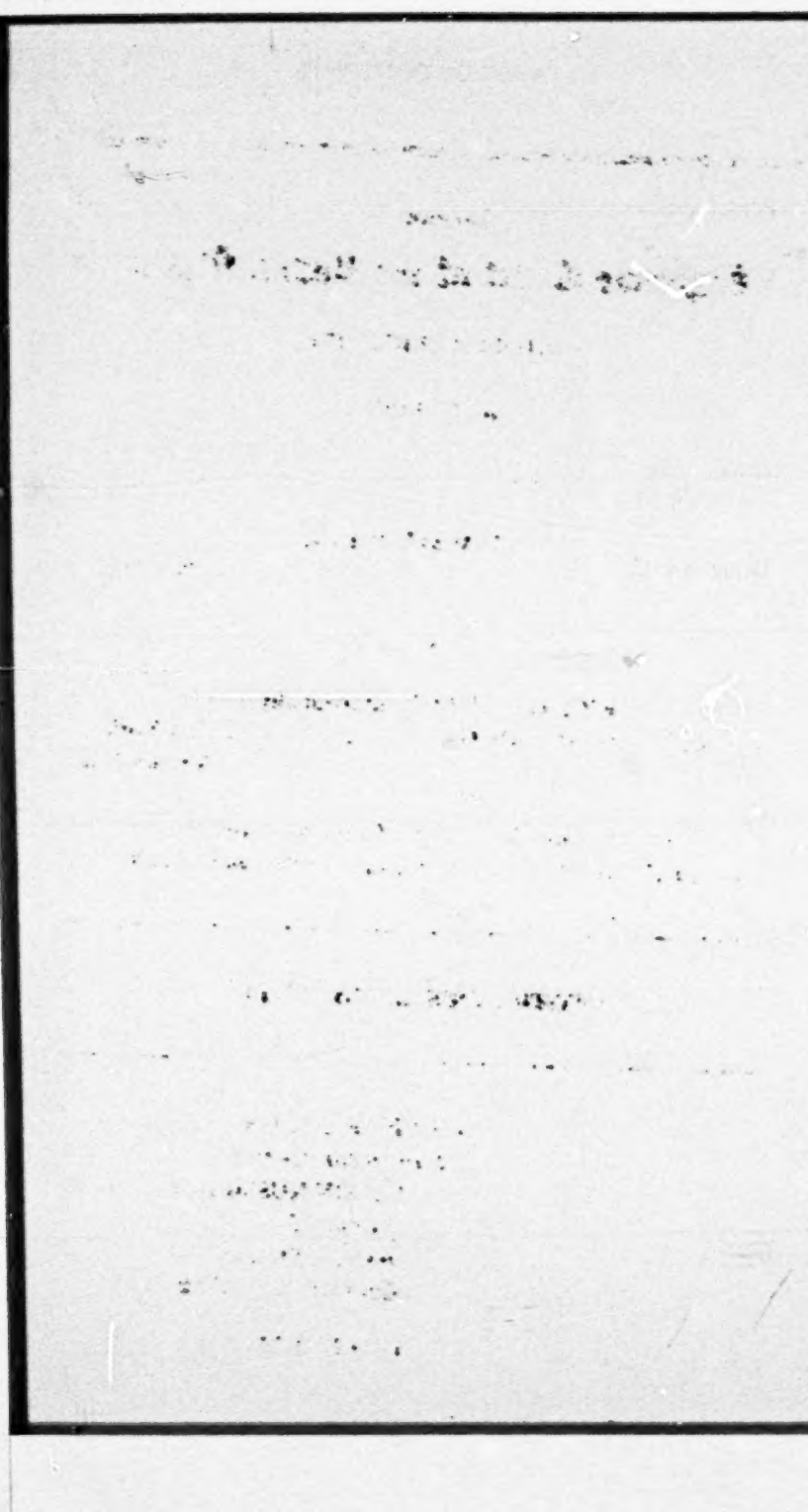


TABLE OF CONTENTS

Page

Petitioner's Reply Brief 1

Conclusion 8

CASES CITED

Coleman v. Alabama, 399 US 1 2

Dolan Properties, Inc. v. Schoolcraft, 75 Misc. 2d 1084; 350 NYS 2d 292, 1973 7

Douglas v. City of Jeannette, 319 US 157, 164 (1943) 6

Gerstein v. Pugh, – US –, Feb. 18, 1975 2

Lamar v. Micoy, 114 US 218, 223 5

Mills v. Green, 159 US 651 5

Nashville, C. & St. L. Ry. v. Walters, 294 US 405 5

People ex rel. SL&T Co. v. Extraordinary Term of the Supreme Court, 220 NY 487 4

Providence Bank v. Billings, 29 US 514 5

Reed v. Littleton, 275 NY 153, 157 7

Matter of Reynolds v. Cropsey, 241 NY 389 4

Richardson on Evid. 10th ed., sec. 17-18, 25 5

Page

Rochin v. California, 342 US 165, 72 S.Ct. 205, 9 L.ed 183 (1952) 4

Russell v. United States, 411 US 423 4

Security Trust Co. v. Lexington, 203 US 323, 333 5

Stuart v. Palmer, 74 NY 183, 189 5

Vick Wo v. Hopkins, 118 US 356, 373-4 5

Watson v. Buck, 313 US 387 (1941) 2

Younger v. Harris, 401 US 37, 53-55 2

OTHER AUTHORITIES

Sec. 149 Judiciary Law, subd. 1 1

N.Y. Judiciary Law Sec. 14, 22 NYCRR 33.3(c)(N.Y. Judicial Conference) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-1425

WILLIAM STEINMAN,

Petitioner,

-v-

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

On petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONER'S REPLY BRIEF

• In asserting that "petitioner has failed to indicate how the instant case is of such a unique character as to require review by this Court" (Resp. Br. p. 12), the Respondent glibly waves out of existence the core issue presented by Petitioner that he has absolutely no adequate remedy at law or meaningful access to the state courts, in view of (*a*) the facially unconstitutional statute *(Sec. 149 Judiciary Law, subd. 1)* patently violative of the independence of the judiciary and the separation of powers ordained by the Fifth and Foufteenth Amendments of the Constitution; and (*b*) the facially unconstitutional

statute (*Sec. 149 Judiciary Law subd. 2*), which seriously diminished the Petitioner's procedural rights of due process, and deprived all criminal defendants at the bar of the Extraordinary Term of the Supreme Court of the equal protection of the laws.

A statute so inherently unconstitutional uniquely meets the test of "extraordinary circumstances" laid down in *Younger v. Harris*, 401 US 37, 53-55, wherein this Court, citing *Watson v. Buck*, 313 US 387 (1941), stated:

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

• Grossly misleading, the Respondent argues that "petitioner's further allegation that he was not, before indictment, afforded a prompt arraignment or preliminary hearing concerns a violation, if any, of state, not constitutional law" (Resp. Br. p. 21).

The fact is, rather, that Petitioner had been deliberately deprived of any arraignment whatsoever, and had been wilfully deprived of his constitutional rights of counsel and of a preliminary examination during a critical stage of the proceedings against him. (*Coleman v. Alabama*, 399 US 1; *Gerstein v. Pugh*, ——US——, Feb. 18, 1975).

To gloss over this grave constitutional transgression, as does Respondent, as "a violation, if any, of state, not constitutional law" is a bizarre contention that literally flies in the face of this Court's holding in *Coleman v. Alabama, supra*, and the fundamental constitutional tenets upon which it is grounded.

Indeed, the Respondent does not, and cannot, controvert that Petitioner had been wilfully denied his right to an arraignment and to the protection of a court and counsel without unnecessary delay following his arrest, as required by constitutional tenets of due process as well as by the strict mandate of New York law. (Petition, pp. 6-9).

In this connection, the Respondent strives to undercut Petitioner's claim, asserted in the action for a Declaratory Judgment below, that he had been held "incomunicado" for almost three months, by misleadingly representing to this Court that Petitioner was not "incarcerated in jail or physically prevented from seeing an attorney." (Resp. Br. p. 21).

Quite to the contrary, the systematic and repeated threats against Petitioner to arraign, book and fingerprint him unless he cooperated with Respondent in entrapping judges and other police sergeants, atop the repeated warnings to him not to divulge or disclose to anyone that he had been taken into custody, on threat that he would be booked, effectively held Petitioner psychologically manacled to his captor as securely as any physical restraints could have been.

The Respondent's disingenuous assertion to this Court, that "throughout that time he remained at liberty" (Resp. Br. p. 21), is of the same cloth as the self-laundered argument he had advanced in the Court of Appeals below that Petitioner had no rights of an arraignment or to a preliminary hearing because "since such rights attach only to an arrest * * * prior to indictment he was never arrested because he was neither booked nor fingerprinted." (Resp. Br. US Court of Appeals, p. 31).

Indeed, Petitioner's allegations in the action below had to be, as they were, assumed to be true by the District Court below (A-9). Thus, Respondent is forclosed from contesting the facts set forth in Petitioner's action for a declaratory judgment.

In the same vein, Respondent urges upon this Court that "the constitutional nature of Petitioner's claims is highly questionable and may in fact be 'nonexistent' * * *. Thus, the investigative techniques allegedly used may well involve only the 'nonconstitutional' defense of entrapment." (Resp. Br. p. 20).

Contrarily, given the conclusively documented prosecutorial misconduct grossly shocking to the conscience at bar, the

Respondent's argument runs directly counter to the poignant expression in *Russell v. United States*, 411 US 423, per Rehnquist, J., that the Court might "some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 US 165, 72 S.Ct. 205, 9 L.ed. 183 (1952 . . . ."

• Respondent's Brief in opposition to the petition for certiorari asserts that "the constitutional questions were clearly not substantial as to warrant the convening of a three-judge panel. * * * The Court of Appeals affirmed this decision, finding that the 'claims relating to the constitutionality of the state statutes are frivolous'." (Resp. Br. p. 20, ff.).

Our respectful submission, in answer, is two-fold:

Firstly, a bare reading of Mr. Justice Cardozo's learned opinion in *People ex rel. SL&T Co. v. Extraordinary Term of the Supreme Court*, 220 NY 487, and of *Matter of Reynolds v. Cropsey*, 241 NY 389 – both cases involving a construction of the very statute in issue at bar, as construed in its *pre-amended* form – conclusively attest to the grave constitutional questions propounded by the Petitioner herein.

To denigrate these issues as insubstantial or frivolous – in the face of these patently invalid statutes – is to make a mockery of the fundamental principles of the separation of powers, the independence of the judiciary and the equal protection of the laws guaranteed by the Fifth and Foufteenth Amendments of the Constitution.

In all truth, the magnitude of this twice-tainted unconstitutional statute, Sec. 149 Judiciary Law subdivisions 1 and 2, is such that it is the very source and fount of the proliferating excesses of prosecutorial misconduct polluting the rule of law for all defendants in the vise of the unconstitutional Extraordinary Term of the Supreme Court.

Secondly, since a *facially* unconstitutional statute may be

judicially noticed, the statute in issue was properly before the District Court and the Court of Appeals for a determination whether it afforded Petitioner meaningful access to the state court, and was inherently violative of the equal protection of the laws to which Petitioner and all others similarly situated were entitled under the Due Process Clause. (*Richardson on Evid. 10th ed., sec. 17-18, 25; Lamar v. Micov,* 114 US 218, 223; *Mills v. Green,* 159 US 651.)

• The Respondent declares that "the power of terminating the assignment and naming another justice to hold the term has not even been exercised as to this Extraordinary Term." (Resp. Br. p. 17).

The test of constitutionality, however, is not whether the independence of the judiciary has or has not been violated. The test is, rather, "by what may, by its authority, be done". (*Stuart v. Palmer,* 74 NY 183, 189; *Providence Bank v. Billings,* 29 US 514; *Vick Wo v. Hopkins,* 118 US 356, 373-4; *Watson v. Buck,* 313 US 387; *Security Trust Co. v. Lexington,* 203 US 323, 333; *Nashville, C. & St. L.Ry. v. Walters,* 294 US 405.)

The Respondent has completely side-stepped any serious attempt to rationalize the dangerously pernicious in-built potentials of *Sec. 149 Judiciary Law,* just as he has studiously ignored Petitioner's central theme that the statute in issue is facially violative of the equal protection clause of the Fourteenth Amendment. (Petition, Point II).

• The Respondent misleadingly contends that "if the judge is biased against petitioner, the latter has an adequate remedy at state law for seeking the judge's disqualification", citing N.Y. Judiciary Law Sec. 14, 22 NYCRR 33.3(c) (N.Y. Judicial Conference).

Our respectful submission, in answer, is that Sec. 14, Judiciary Law does not apply, for it provides for disqualification of a judge only in the limited situations "to which he is a party, or in which he has been attorney or counsel, or in which

he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. * * *"

Moreover, even if a motion for disqualification were to be seriously entertained, generally, there would be no other available judge to replace the single, solitary designee of the Governor to preside over the Extraordinary Term of the Supreme Court. To meet such contingency, the Governor would have to appoint a new extraordinary term and designate another Judge to preside in his place, as authorized by *Sec. 149 Judiciary Law, Subd. 1.* Manifestly, with such formidable procedural and practical hurdles, blocking any potential motion for disqualification of the single judge currently operating the Extraordinary Term of the Supreme Court in the five counties of New York City, the likelihood of advancing such a motion successfully would be relatively nil. As compared to defendants in the regular terms of the Supreme Court, this Petitioner and all others similarly situated are therefore singularly deprived of the equal protection of the laws.

• In its oral opinion, the Court of Appeals held that "the need to defend against a State criminal prosecution is not the irreparable injury which is a prerequisite to Federal intervention. See, e.g. *Younger v. Harris,* 401 US 37, 46 (1971) and *Douglas v. City of Jeannette,* 319 US 157, 164 (1943)". (SA 3-4).

Overall, the Petitioner has been irreparably injured in that he has been utterly deprived of an adequate remedy at law and of all meaningful access to the state courts (Petition, Point II).

Additionally, Petitioner has been, is being, and will be subjected to great and immediate irreparable injury by the fact that his presently precarious financial situation may inevitably force him to abandon his right to defend, and compel him to drop the multiplicitous appeals now pending in the state and federal courts on constitutional grounds for want of foreseeable financial resources. (App. U.S. Court of Appeals, p. 96).

Accordingly, this prosecution vastly transcends the mere

"cost, anxiety, and inconvenience of having to defend against a single criminal prosecution." (*Younger v. Harris*, 401 US 37, 46; *Douglas v. City of Jeannette*, 319 US 157, 164; *Watson v. Buck*, 313 US 387, 400), or the financial disarrangements caused by the "usual and customary course" of criminal prosecutions (cf. *Reed v. Littleton*, 275 NY 153, 157), grounded as it is on an extraordinary compote of extreme bad faith, harassment, scandalously shocking prosecutorial misconduct, and patent unconstitutionality of the statute purportedly creating the "court" and arm of the grand jury that produced this indictment.

Certainly, in the unprecedented situation presented at bar, a prosecutor should not be permitted to so multiply his own crimes of prosecutorial misconduct as to drown the accused in a forbidding maelstrom of protracted and costly litigation.

Petitioner's mounting counsel fees and expenses for defending the pending state prosecution against him and appealing any conviction therefrom and possible further appeals therefrom, have resulted in an enormous drain against his financial resources. He would, nevertheless, be ineligible for relief as an "indigent" person (see *Dolan Properties, Inc. v. Schoolcraft*, 75 Misc. 2d 1084; 350 NYS 2d 292, 1973).

He has barely any savings, and is now deeply in debt. In addition to the mounting litigation in the Federal proceedings at bar, a separate Declaratory Judgment action testing the constitutionality of the statute is now pending in the appellate courts, both state and federal. The Petitioner would have to commit himself further into debt in order to prosecute the enormously extensive appeals therefrom to the New York State Court of Appeals and the United States Supreme Court.

The starkly realistic alternative now facing Petitioner is the grim probability of an unjust, economically coerced and truly involuntary plea of guilty to the indictment, or to submit helplessly to any unappealed conviction, should there be any. Thus, caught in the vise of a Catch-22 situation, the Petitioner now stands in grave jeopardy of irreparable injury in the

pending State criminal proceedings against him, for which he has no meaningful remedy at law in the State courts.

In net effect, to meet this hydra-headed assault by the respondent Nadjari against Petitioner's constitutional rights, in both State and Federal forums, on the trial level, and in the appellate echelons up to the United States Supreme Court and then conceivably back again via federal habeas corpus relief, as intimated by the District Court below (A-10), would so likely enfeeble and impoverish the Petitioner into ever deeper debt, frustration and anguish as to impel him into abandoning his just fight to redress his rights altogether.

We earnestly submit that the fairly imminent danger of such eventuality, constituting great and immediate irreparable injury in the extraordinary situation at bar, should have been considered by the Courts below, especially where as here, the Respondent's own shocking misconduct is the very inducing cause of Petitioner's untenable predicament.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

May 25, 1975

HERVEY & LEGUM
Attorneys for Appellant
16 Court Street
Brooklyn, New York 11241

AARON NUSSBAUM
of Counsel